

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE: FIRSTENERGY CORP) CIVIL ACTION NO.
SECURITIES LITIGATION) 2:20-cv-3785

THIS DOCUMENT RELATES TO:)
ALL ACTIONS)

Remote Status Conference held before
Special Counsel Shawn Judge

Thursday, September 28, 2023
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Reporter: Kristin Wegryn, RMR, CRR

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1 P R O C E E D I N G S

2 MR. FORGE: And I just want to make
3 sure -- I don't want to speak out of turn. Do
4 you want me to address the confidentiality
5 designation issue, or are we going to wait on
6 that one until -- I don't know who is present.

7 MR. JUDGE: Why don't we wait on that
8 one for a period to see how much time we have to
9 see who is present and to see if we need
10 briefings. There was a request for some
11 additional briefing on it that we could discuss
12 at the end.

13 MR. FORGE: Okay.

14 MR. JUDGE: If we have time, I'd like to
15 get to it a little bit today, but I view that as
16 a secondary issue of sorts.

17 So it's September 28th, 2023. It's
18 11:18. We're currently on the record. We're in
19 the matter of In Re: FirstEnergy Corp Securities
20 Litigation, case number 2:20-cv-3785. It's a
21 proceeding before the Special Master Shawn Judge
22 in which we're going to entertain an oral
23 argument in some of the various pending motions
24 to compel.

25 Plaintiff, please identify yourself for

1 purposes of the record and if you would proceed.

2 MR. FORGE: Thank you. This is Jason
3 Forge on behalf of the plaintiffs.

4 The first motion I want to address is
5 the motion concerning the FirstEnergy internal
6 investigation.

7 As we laid out in the papers, the
8 essence of the issue is twofold: Number one, it
9 is apparent that the -- at least the initial
10 internal investigation was directed for a
11 primarily business purpose. Specifically,
12 FirstEnergy delayed releasing its financial
13 results for the second quarter of 2020 because of
14 the arrests of Larry Householder and others.

15 We have testimony from multiple
16 witnesses in addition to documents that confirm
17 that one of the essential prerequisites to
18 issuing that 10-Q was getting sign-off from the
19 outside auditor, PricewaterhouseCoopers, which
20 I'll refer to as PwC.

21 It is, it is apparent from the scope of
22 the investigation and the duration of the
23 investigation -- I'm using "investigation" in
24 this context in air quotes -- that the principal
25 purpose was not to get to the bottom of what

1 happened, not to prepare for litigation, but to
2 assuage PwC.

3 And I say that for multiple reasons:
4 First and foremost, there's -- just on practical
5 terms, there's no way an investigation into these
6 issues could be completed in a matter of a few
7 weeks, which is what FirstEnergy and its outside
8 counsel, Squire Patton, represented to PwC.

9 After only a few weeks, they told PwC
10 the investigation was complete. And the only
11 additional information that they may have going
12 forward would be information provided by the
13 government.

14 They revealed extensive investigation
15 results and work product to PwC for the purpose
16 of getting that comfort assurance from PwC. And
17 when I say that, I refer to witness interviews,
18 summaries of witness interviews, attorney
19 conclusions regarding whether there was actually
20 any unlawful conduct.

21 So the disclosure to PwC was nearly
22 complete. I say "nearly" because there was an
23 exception of I believe seven documents, just a
24 handful of documents, that that was all that was
25 withheld from PwC. But even that aspect, the

1 fact that they withheld documents from PwC,
2 demonstrates that PwC was not part of this actual
3 endeavor. They were not assisting the
4 investigators; they were not assisting
5 FirstEnergy. If they were, then FirstEnergy
6 wouldn't have withheld any documents from PwC as
7 being privileged. They would have been part of
8 the privilege, but they weren't.

9 And so at least as to this first part of
10 the investigation, the extent of the disclosure
11 to PwC and the purpose both speak to a lack of
12 attorney-client privilege, a lack of work product
13 privilege. And if there ever was one, a waiver
14 as to both.

15 I'm happy to move on to the next -- to
16 the broader scope, but I want to pause here in
17 case the Special Master has any questions for me.

18 MR. JUDGE: Please proceed.

19 MR. FORGE: Okay. As we move on to the
20 broader and more ongoing internal investigation,
21 we are, once again, confronted by the reality
22 that FirstEnergy -- there's, there's a "but for"
23 test here when we're talking about whether it's a
24 primarily legal purpose.

25 FirstEnergy has to establish -- and it

1 is their burden. They have to establish that
2 they would not have conducted either the initial
3 investigation, which is primarily retained and
4 listed by the board, or the broader investigation
5 involving Jones Day, they would not have done
6 either investigation but for the threat of
7 litigation. And they simply have failed to do
8 that. And, once again, I think we're aided by
9 common sense when we're assessing that assertion.

10 This was and, frankly, remains a huge
11 public scandal. There's no question. I think
12 everyone would agree that the publicity
13 surrounding the arrests of Larry Householder and
14 others was front-page news for days and remained
15 news for months. And, as Mr. Jones's counsel
16 points out in a different context, it remains
17 front-page news from time to time today.

18 So FirstEnergy, whose business revolves
19 around dealing with either local, state, or
20 federal regulators, politicians, has to be keenly
21 aware and keenly concerned with the perception of
22 their corporate culture, with the perception of
23 the way they do business.

24 So the notion that if they had just been
25 given immunity from all civil and criminal suits

1 on day two, on July 21st, 2020, the notion that
2 they would have just shut down or not even
3 started any investigations, it just isn't
4 realistic.

5 They had to conduct an internal
6 investigation. They had to determine who needed
7 to be terminated, who could be retained. These
8 were HR purposes. Yes, these are extreme HR
9 circumstances, but they're still HR purposes,
10 which the cases hold uniformly are business
11 purposes.

12 They also still have their SEC filings
13 that they have to deal with. That's also a
14 business purpose. So investors are also
15 concerned about this. They have to obtain or
16 secure outside access to capital. That is also a
17 business purpose.

18 They simply have failed to establish
19 that. But for the threat of litigation, they
20 wouldn't have cared at all about public
21 perception, regulator perception, investor
22 perception, or access to capital. And they can't
23 establish those things.

24 So the investigation certainly had a
25 dual purpose. We are not -- I'm not here to tell

1 you or try to convince you that the investigation
2 wasn't related to legal purposes. It certainly
3 was. But it does not pass the "but for" test.

4 Even if it did, however, the waivers,
5 the disclosures to the government here -- first
6 of all, they committed to the government to
7 provide any information the government wanted.
8 Yes, they had a line in the Deferred Prosecution
9 Agreement that they aren't waiving their
10 privilege, but they simultaneously agreed to
11 provide the government with any information they
12 wanted, including information about the
13 investigation.

14 Now, the fact that the government may or
15 may not have taken them up on that offer really
16 is not the issue. We're talking about privilege,
17 because one of the elements for privilege is that
18 the confidentiality has to be all reasonable
19 steps have to be taken to maintain the
20 confidentiality of the privilege. Well, it's the
21 opposite of reasonable a step to maintain the
22 confidentiality when you offer to a third party
23 to disclose the information. But beyond the
24 government, the disclosures in this case have
25 been extensive. But what's more of a concern to

1 us is they have been selective.

2 And this occurred just recently, just
3 last week in a deposition. One of the party
4 defendants, Mr. Pearson, testified, and when he
5 was asked on cross-examination whether his
6 communications with counsel regarding one aspect
7 of their investigation, HR-related issues,
8 whether he was seeking legal advice, he said, No,
9 I wasn't seeking legal advice.

10 Perhaps sensing that that was going to
11 be used by us, FirstEnergy then took a break,
12 obviously, conferred with the witness, came back,
13 and then they chose to ask the witness questions.

14 One of the questions they asked
15 Mr. Pearson was whether the investigation
16 involved legal issues. Not whether it was
17 primary, but whether it involved legal issues.

18 He said, Yes, it did.

19 Then we got up again and asked him:
20 That information FirstEnergy just elicited from
21 you that this investigation involved legal
22 issues, from whom did you obtain that
23 information?

24 And his answer was: I obtained it from
25 counsel.

1 And what we confirmed there -- he then
2 said, confirmed for us.

3 So FirstEnergy's counsel just elicited
4 from you and asked you to tell us about
5 information that you obtained from counsel; is
6 that right, sir?

7 And he confirmed that that was correct.

8 So yet time and again -- and you've seen
9 it in the papers. Time and again, FirstEnergy is
10 improperly instructing this witness that if they
11 obtained information from counsel, they're not
12 allowed to discuss it. And even though they are
13 repeatedly disclosing information provided by
14 counsel, we've established that virtually the
15 entire Statement of Facts from the Deferred
16 Prosecution Agreement was provided by counsel,
17 yet time and again, FirstEnergy is instructing
18 witnesses not to disclose that very same
19 information to us because they obtained it from
20 counsel.

21 And what they're effectively doing here
22 is playing both sides of this issue. They are
23 appeasing the government by making these
24 admissions, but they are complicating our efforts
25 at discovery in this case by silencing these

1 witnesses, and they're doing it improperly.

2 So they can't have it both ways. If
3 this information is privileged, well, they've
4 disclosed it and they have a waiver. If it's not
5 privileged, then they're not entitled to instruct
6 these witnesses not to answer questions
7 concerning it. Even within the same depositions,
8 they are taking contrary positions on that very
9 issue.

10 In the testifying aids, which I refer to
11 as scripts because they're given to witnesses who
12 have no personal knowledge of the information, in
13 these scripts, FirstEnergy discloses conclusions
14 that were drawn by lawyers. That is -- those are
15 mental impressions from lawyers. That is classic
16 work product that they are openly disclosing and
17 using in this case, mental impressions about
18 candor of witnesses, mental impressions about
19 what witnesses knew and didn't know. I'll give
20 you a couple examples:

21 Bradley Bingaman, a FirstEnergy
22 employee, is described as knowing that
23 FirstEnergy was paying Sam Randazzo for years to
24 do nothing. That is a mental impression.

25 It's not enough to say, well, there's an

1 email that supports it. That's true, there is an
2 email that supports it. The statement was not
3 "there's an email in which Bradley Bingaman says
4 X." The statement was: Bradley Bingaman was
5 aware that FirstEnergy was paying Sam Randazzo to
6 do nothing.

7 So we have also extensive disclosures of
8 mental impressions and conclusions by the
9 lawyers. So there really -- it's impossible to
10 draw the line or to identify the line that
11 FirstEnergy is drawing here so we can determine
12 what the witnesses can disclose and what the
13 witness can't disclose.

14 Early on, they were disclosing freely,
15 including in these scripts, a wealth of
16 information provided by lawyers. Once the
17 possibility of attacking the privilege arose, now
18 the very same information they're not allowing
19 the witnesses to discuss with us.

20 And so that's improper on two fronts:
21 One, they're asserting privilege over something
22 that's already been waived, if it ever was
23 privileged; but then, number two, what they're
24 effectively doing is deeming facts to be
25 privileged if those facts were provided by a

1 lawyer.

2 And I want to be clear. We're not
3 asking these witnesses, tell me about the
4 conversation with the lawyer when you learned
5 this information. We are simply asking about
6 this information.

7 And, look, whether you want to say to
8 their credit or not, some defendants are really
9 exploiting this because what they're telling
10 these witnesses is, okay, I want you to put out
11 of your mind anything you ever learned from any
12 lawyer. So just erase that from your memory.

13 Are you aware of any information that
14 Chuck Jones violated FirstEnergy's code of
15 conduct?

16 And then the witness says no. It's
17 creating a horribly misleading record because all
18 of these witnesses do have information supporting
19 the DPA, supporting FirstEnergy's terminations of
20 employees, but they are being handcuffed by this
21 instruction to not disclose or even rely on
22 information that was provided by lawyers.

23 And so, by essentially walling off
24 facts, we are winding up with a highly misleading
25 record here and, for that reason, we think it is

1 really important to confirm that none of these
2 facts, whether they're provided by lawyers or
3 otherwise, are privileged. And if they were by
4 some means that I'm not aware of, any privileges
5 have been waived.

6 MR. JUDGE: Do I have any portion of the
7 Pearson depo last week, the transcripts in front
8 of me?

9 MR. FORGE: No, you don't, Your Honor,
10 or Mr. Special Master, but I can provide that to
11 you.

12 MR. JUDGE: Yeah, if you would, please.

13 MR. FORGE: And, actually, I stand
14 corrected. It was defendant Strah where that
15 occurred. But it was still -- but we can, we can
16 provide that today. No problem.

17 MR. JUDGE: I have some of the Strah
18 deposition transcripts, but --

19 MR. FORGE: Even while we're on -- I can
20 get that and share that while we're still going
21 on with the hearing. It won't take me long.

22 MR. JUDGE: That would be great.

23 So it was Strah who we're talking about.

24 MR. FORGE: Yes, who was, who was
25 acting, acting and an actual confirmed CEO.

1 MR. AXELROD: Mr. Judge, this is Dave
2 Axelrod. I represent Jim Pearson. I just want
3 to clarify for the record that Mr. Pearson never
4 made any such testimony. He was, in fact, gone
5 by the company -- gone from the company by the
6 time that investigation took place. So I --
7 Mr. Forge has admitted he was mistaken, but I
8 just want to make sure, because this is being
9 transcribed, that the record is correct.

10 MR. JUDGE: I appreciate that. Thank
11 you.

12 Yeah, if you would get that to me,
13 please, as soon as you can, either during this or
14 right after.

15 Okay. Any other points you want to
16 make?

17 MR. FORGE: No, I don't. I'm happy to
18 address any questions you have or anything that
19 comes up when FirstEnergy speaks.

20 And, also, I should say, although they
21 didn't join in the actual paper of our reply,
22 defendants Jones and Dowling are also a part of
23 this motion, so I should -- as are the opt-out
24 counsel. So I don't want to hog the mic if any
25 of them have something to add.

1 MR. JUDGE: I appreciate that.

2 Any of those individuals have anything
3 to add before we turn this over to David?

4 MR. MCCAFFREY: Nothing to add. This is
5 John McCaffrey on behalf of defendant Michael
6 Dowling. Nothing to add to what Mr. Forge has
7 already stated. Thank you.

8 MR. JUDGE: Thank you.

9 MR. MIARMI: And for the direct action
10 plaintiffs, Your Honor.

11 MR. JUDGE: Thank you.

12 MS. RENDON: And same for counsel for
13 Mr. Jones.

14 MR. JUDGE: Thank you. I appreciate it.
15 David, your ball.

16 MR. REIN: Thank you.

17 First of all, I would encourage you to
18 interrupt me with questions or thoughts. I
19 certainly want to make sure we're being
20 responsive to what is on your mind and that we're
21 being, you know, most helpful as we present here.

22 I think it would be useful just to take
23 one step back as to what is going on, right?
24 Because, you know, we all know there's basic
25 principle. Of course, we've got one lawyer who

1 doesn't get to look in the files of the other
2 side.

3 And what the movants are asking for here
4 is wholesale production of all documents, all
5 communications from two lengthy internal
6 investigations conducted by their adversary's
7 counsel. The focus today is on a lot of sort of
8 niche parts of that and small parts of that or
9 smaller parts of that, but what the motion seeks
10 is absolutely everything without distinction.

11 There is no case they have cited to
12 where that has happened, right? They cite to
13 cases that talk about particular documents and
14 whether they should be produced because they're
15 not work product, or where investigations were
16 not conducted by lawyers. And, in those cases,
17 they're not privileged. But they don't cite to
18 anything that's the same as this, and I think
19 that's quite telling.

20 Because when companies face serious
21 allegations like what has happened here, like
22 what Mr. Forge was just describing to you, it's a
23 very common response for a board to hire lawyers
24 to analyze it and advise the board, as well as
25 lawyers to advise the company. And that's what

1 happened here after the fact.

2 And when that news broke on June 21,
3 that's exactly what they did, right? The
4 independent directors hired the Squire law firm,
5 led by a former US Attorney. The company hired
6 Jones Day, and they both conducted lengthy
7 investigations.

8 If it were true that, you know, these
9 things get turned over in the types of situations
10 described here, you would certainly see cases
11 where that has happened, but we don't. And
12 taking that approach, obviously, would change
13 what companies do, because companies would not
14 then be able to conduct those kinds of
15 investigations, get to the bottom of things, and
16 get advice.

17 You know, here the -- both
18 investigations, just at the outset, are things
19 that are plainly covered by privilege, you know,
20 and by work product. They're privileged
21 because -- they are because of litigation.
22 That's the Sixth Circuit test in Roxworthy
23 because of litigation. And you heard here today
24 from Mr. Forge that there wouldn't have been an
25 investigation but for the fact that there was a

1 DOJ grand jury subpoena, you know, media reports.
2 It wasn't just anticipated litigation; it was
3 actual litigation.

4 And what we have done here is provide
5 you with an affidavit from one of the outside
6 directors who oversaw that Squire investigation.
7 And he testifies why they did an investigation.
8 He explains that it was because of the potential
9 criminal liability and because of the onslaught
10 of civil litigation. And so, you know, this is
11 not just us speculating about that.

12 Now, you heard a fair amount from
13 Mr. Forge about the initial phase of the Squire
14 investigation for the board, and he tells you
15 that this was done -- you know, that they were,
16 you know, retained in order to assuage PwC.

17 So, you know, first of all, we have
18 Mr. O'Neil's testimony as to why they were
19 retained, why Squire was retained, and he tells
20 you that it's because of the DOJ action because
21 of the onslaught of litigation. And he explains
22 that Squire provided advice and analysis to the
23 board, and he says that but for the DOJ
24 investigation, this wouldn't have happened.
25 There would not have been the -- this internal

1 investigation.

2 Mr. Forge said, well, maybe the form
3 would have been different if there had been some
4 sort of immunity deal on day two. Now, that
5 didn't happen, of course. We have to look at
6 what the real world was where that didn't happen.

7 But what Mr. O'Neil testified is that
8 the shape of the investigation was based on what
9 the company actually faced. So they were getting
10 advice on what was, on what was actually
11 unfolding.

12 The issue of, well, did they -- you
13 know, was there some sort of rushed thing just to
14 satisfy PwC and, therefore, a business purpose.

15 It wasn't, but let's just step back to
16 the standard for a moment, right? Because for
17 privilege, the question is what is the
18 predominant purpose, right? There can be
19 other -- if there are other purposes, that's
20 okay. That's what, that's what Magistrate/Judge
21 Jolson said in Abingdon Emerson. That doesn't
22 waive privilege.

23 And Mr. Neil -- Mr. O'Neil specifically
24 testified the purpose was not to assuage PwC. He
25 literally says that in his affidavit, paragraph

1 27.

2 What is really ignored, I think, by the
3 movants here is that this was an initial phase of
4 the investigation. Again, this is explained by
5 Mr. O'Neil. He says how the investigation
6 continued for months. In fact, it went for about
7 a year where they were getting advice, analysis
8 from Squire for over a year. He says that in
9 paragraph 21 of his declaration.

10 There's nothing unusual about getting,
11 you know, results as the thing goes along, having
12 different phases. There's nothing unusual about
13 that. A board cannot just sit on its hands and
14 await, you know, a yearlong investigation in the
15 face of this barrage of criminal and civil
16 potential liability. They had to do things and
17 they had to start to reach conclusions, even if
18 they were conclusions that would develop and
19 change over time.

20 So, you know, Mr. Forge said, well, no
21 reasonable investigation would do that within 17
22 days.

23 Look, the reality is, no reasonable
24 investigation, no reasonable client could just
25 sit around and wait for all of that time as

1 things play out.

2 And --

3 MR. JUDGE: Talk to me a little bit
4 about FirstEnergy withholding documents from
5 their own auditor.

6 MR. REIN: So a couple of points on
7 that.

8 First of all, the law is settled that
9 work product is not waived when it's shared with
10 an auditor, right? So a lot of what Mr. Forge is
11 talking about is work product, potential work
12 product, right? Because that's -- it's not
13 waived because an auditor is not your adversary,
14 right? And they say that in their opposition,
15 that that's the standard. And I think the law is
16 very settled on that question.

17 Privilege. The company did not provide
18 privileged information to PwC, the auditor.
19 Mr. O'Neil testifies to that. He says that both
20 Squire and Jones Day were not authorized to
21 provide privileged information to PwC.

22 So I think what's going on here is we're
23 sort of mixing up the concepts between, you know,
24 privilege and between work product. So to the
25 extent any work product was shared with PwC as an

1 auditor, that is not -- you know, that's not a
2 waiver of anything.

3 And the fact that information was shared
4 with PwC as an auditor is also not something that
5 is unusual. In fact, that has to happen in every
6 case involving potential liabilities, especially
7 potential material liabilities. Companies will
8 always have to have discussions with their
9 auditor on that question.

10 If that, if that was what caused waiver,
11 if that is some sort of notice that something is
12 not privileged or not work product, then every
13 time there's an internal investigation, every
14 time a company is dealing with these kinds of
15 significant issues, you'd be seeing waiver every
16 single time. The fact that we don't I think is,
17 again, you know, very, very telling as to what's,
18 you know, going on here.

19 You know, Mr. Forge said to you, well,
20 the -- you know, the allegations that came up in
21 this Householder complaint, you know, they would
22 have had a significant impact on the company and,
23 therefore, they would have investigated anyway,
24 even if there was -- regardless of whether there
25 was some sort of criminal proceeding going on or

1 if they settled it or something.

2 You know, this is totally speculative,
3 right? Because I think the test that's in front
4 of you is what actually happened. What actually
5 happened here. They couldn't really be the same
6 allegations and the same, you know, government
7 actions going on and no litigation risk at all.
8 When faced with those kinds of allegations,
9 plainly, there's litigation risk. So, you know,
10 we're really sort of talking about an artificial
11 universe.

12 And I think one key concept to remember
13 here is when Mr. Forge talks about, well, would
14 the investigation have been in the same form,
15 what the cases are typically talking about -- in
16 fact, almost all talking about is would a
17 document have been created in the same form but
18 for litigation, right? Not, not whether an
19 investigation would have been in the same form
20 but for litigation, would a document have been.

21 But this motion is so broad, it doesn't
22 talk about specific documents and whether they
23 would have been in the same form, and so it
24 doesn't really align with the case law which is
25 really talking about specific documents and

1 specific communications.

2 And so, you know, it's really something
3 that's quite different. And if we look at the
4 types of the cases they actually rely on, they're
5 nothing like this case.

6 So take, you know, Valiant, for example.
7 They rely on that quite heavily. That was a
8 nonlawyer, the consulting firm FDI doing work
9 about a restatement, right? So they created the
10 fine -- the financial reporting that was used for
11 a restatement.

12 So it wasn't privileged to begin with.
13 And yes, that would have -- a restatement would
14 have happened anyway because the company was
15 obligated to issue new financial statements.

16 So that's the type of thing that is
17 going on. And when we talk about an alternative
18 universe and would something have been done the
19 same way, yes, they would have done the
20 restatement the same way because they're
21 obligated to restate their financials. That's
22 very different. That sort of targeted issue is
23 very different to saying, well, an entire
24 investigation over two years would somehow have
25 been different.

1 Now, he also talked to you about the
2 employment decision issue. And in Mr. O'Neil's
3 testimony, he explains that, well, the employment
4 decisions that were made were really ancillary --
5 that's the term he uses -- to the purposes of the
6 investigation.

7 The purpose is responding to the
8 criminal and civil liability. But, of course, if
9 the board learns things, you know, in the course
10 of that and makes employment decisions, they're
11 going to do that. That's how things develop over
12 time. That doesn't change an investigation
13 because of litigation, right? It's just an
14 ancillary part of it. That doesn't change
15 things.

16 In fact, some of those employment
17 decisions were even made because of conduct in
18 the investigation. So some employees didn't
19 cooperate in the investigation or were
20 insufficiently cooperative. The chronology of
21 that is that the investigation itself couldn't
22 have been to figure out who wouldn't cooperate
23 with an investigation. That wouldn't quite make
24 sense.

25 So yes, employment decisions happened,

1 but that doesn't render anything -- it doesn't
2 render an investigation not protected by
3 privilege or work product. He mentioned about,
4 well, outside capital. A company needed to raise
5 capital, and that was a business purpose.

6 But if you, if you sort of dig into the
7 brief, what that's really based on is sort of
8 essentially one line in a board presentation and
9 an undated board presentation. It doesn't say
10 the investigation is -- you know, it doesn't
11 actually talk about a purpose of an
12 investigation. It just says something to the
13 effect of if the investigation is resolved by
14 December 2021, the company will still have to
15 make material changes to its credit agreements.
16 That doesn't really tell you anything about, you
17 know, why the investigation was done and it
18 doesn't sort of add anything to this.

19 You know, on waiver, we've talked about
20 how, you know, providing information, providing
21 work product to an auditor confidentially is not
22 waiver. And, by the way, the auditor must keep
23 it confidential because, otherwise, they'd be in
24 breach of their ethical standards. So, you know,
25 we would know that they would keep the

1 information confidential.

2 And if they truly were an adversary,
3 then they would have had to resign because an
4 auditor can't be adverse to the company that's
5 auditing. But they didn't resign.

6 So they're not --

7 MR. JUDGE: Talk to me, talk to me about
8 the Department of Justice waiver. If we assume
9 for the sake of argument privilege here, you
10 know, the materials -- quite a bit was apparently
11 turned over to the Department of Justice.

12 MR. REIN: Yeah, but we didn't provide
13 privileged information to the Department of
14 Justice.

15 One of the document requests in this
16 case is to provide documents that have been
17 provided to the Department of Justice. We've
18 done that. In fact, the company continues to do
19 that, as well as to, you know, documents provided
20 to other regulators, too. We're not doing that
21 and we're not blocking that.

22 And, by the way, the reason we're not
23 blocking that sort of gets to a point that
24 Mr. Forge made, which is they are -- we are
25 absolutely allowing access to the facts to what

1 happened here. We're not holding that back.
2 That's why they have, at this point now, over a
3 million pages of documents. Because you want to
4 find out what happened at the time, absolutely,
5 right? We've provided that. They have many,
6 many documents. Not holding that back. They
7 have, at this point, dozens of depositions,
8 dozens more to come. We're not doing that,
9 right?

10 What, what -- I think the -- what
11 Mr. Forge has been talking about is, well, can
12 you also ask about privileged things. If
13 you've -- your discussions with your lawyer about
14 things.

15 Whatever it is in the Strah deposition,
16 that's obviously not in the papers as something
17 they're raising today for the first time. And
18 whatever that may be, I think the remedy for an
19 improper objection to a deposition question is a
20 direction to answer the question, right? That's
21 how we deal with those types of things.

22 If we got that wrong, we can deal with
23 it that way. We can discuss it with plaintiffs
24 if they think we're wrong. Sometimes they raise
25 privilege issues with us and we've agreed with

1 them. That can happen when you're making
2 decisions on the fly.

3 But that isn't a whole- -- that doesn't
4 mean that there's some sort of wholesale -- this
5 requires sort of a wholesale production of two
6 lengthy internal investigations. That would be
7 an extraordinary remedy for, you know, sort of
8 getting a deposition instruction wrong.

9 These instructions have generally been
10 along the lines of, you know, you caution the
11 witness, don't testify to something you've
12 learned from your lawyer. Don't testify to a
13 communication with your lawyer. You know, we put
14 that in our brief.

15 In fact, Mr. Dowling, one of the movants
16 here, his counsel said the same thing to one of
17 the witnesses. I'm not asking you to testify to
18 what you learned from a lawyer. Okay. We're not
19 blocking facts. What we're blocking is
20 communications with lawyers.

21 MR. JUDGE: Communications. So mental
22 impressions or advice, you know, learned from a
23 lawyer, fine. Yeah, of course, that's
24 privileged. But facts learned from a lawyer
25 you're saying are not involved here, not an issue

1 or they're privileged, as well?

2 MR. REIN: I think it gets more
3 complicated.

4 So let's -- to be clear, facts are not
5 privileged, right? We are not taking that
6 position.

7 MR. JUDGE: Okay.

8 MR. REIN: That's absolutely clear.

9 But sometimes you have a communication
10 with a lawyer where, you know, there are facts
11 that are discussed in that communication. It
12 doesn't mean that we sort of, you know, produce
13 some sort of redacted version of the
14 back-and-forth with the lawyer -- here's sort of
15 the noun but we're not giving you the verb.

16 That's not really how one could do this,
17 right? So there's no facts about what has
18 happened that we're hiding or something like
19 that. Because, you know, these were lawyer
20 communications. That's not, that's not what
21 we're doing. We're just saying -- you know,
22 we're talking really now about the after-the-fact
23 communications; that where you're advising people
24 and talking, you know, with clients about -- you
25 know, they're asking you things or you're

1 discussing with them.

2 And it's impossible that you could
3 really -- you know, that two humans could have a
4 conversation and no factual content enters into
5 that communication. So, you know, it gets
6 tricky. I accept that. But I just want to be
7 clear because I think there's some sort of
8 suggestion here that we're saying facts get
9 protected because, you know, they're part of
10 lawyer communications.

11 No, facts are not protected. They can
12 learn about facts. You know, go ahead, ask
13 witnesses about facts. Get documents about
14 facts, right? That's the facts that happened,
15 right, leading up to this indictment and, you
16 know, the revelation of the allegations, right?
17 All of these underlying facts, we are not
18 blocking that at all.

19 MR. JUDGE: So the facts -- they can
20 inquire at a depo of a witness about facts that
21 the witness learned from an attorney?

22 MR. REIN: I think if you've learned
23 from an attorney, I think then we're getting
24 into, you know, the legal advice issues, right?
25 Because, at that point, you're not really talking

1 about the person's preexisting knowledge. What
2 did you know in 2020? What did you know in 2019,
3 right? You're having a discussion with your
4 lawyer about, about other things. You know, what
5 did the company do? What -- if there's some
6 context that you need in order to advise a
7 client, you may have to, you know, talk about
8 facts with a client.

9 But that doesn't render, you know, that
10 discussion somehow, you know, not privileged
11 anymore because there's a fact in the discussion.
12 It remains a privileged discussion and it remains
13 protected by work product because it's -- those
14 discussions are coming up in the context of
15 defending claims, right? Defending civil claims
16 here or defending, you know, criminal claims,
17 whatever it may be. Responding to regulators,
18 all of those things are in the work product
19 world, and so this is coming up, you know,
20 through that.

21 If the witness knew facts from, you
22 know, their involvement at the time, they
23 should -- we're not blocking the testimony on
24 that. You know, and that's, of course, what
25 matters in the case, right? It's not the

1 lawyer's analysis after the fact that matters;
2 it's what happened at the time. And, you know,
3 all parties couldn't build their claims and
4 defenses, whatever else, based on that.

5 And, you know, our aim is to be
6 entirely, you know, cooperative and making sure
7 we provide that while, at the same time, you
8 know, protecting what are privileged and work
9 product communications.

10 The testimonial waiver -- sorry.
11 Testimonial waiver was the way Mr. Forge
12 described it. The testimonial aid is something
13 else that he raised and said that, you know, this
14 was waiver.

15 And, you know, this was, you know, a --
16 as commonly happens, the 30(b)(6) witness had a
17 testimonial aid that was then provided to all
18 parties, because it's very hard for one person to
19 remember all the details. And so that was
20 something that was provided and provided to all
21 parties.

22 The plaintiffs and movants point to four
23 statements in that about employment decisions,
24 and they say, well, those were, those were a
25 waiver.

1 Now, just sort of at the threshold, if
2 those somehow were a waiver, that's not a waiver
3 of an entire, you know, investigation, right?
4 That's sort of a waiver on the specific point and
5 not some, you know, broad waiver as to absolutely
6 everything.

7 But, you know, these statements in this
8 testimonial aid were not privileged and were not
9 work product and they weren't revealing any of
10 that. So there wasn't, you know, any waiver to
11 begin with. Because what they -- you know, what
12 they talked about was things that were either,
13 you know, already in the record or that were, you
14 know, sort of ultimate conclusions of the
15 investigation, which is not a waiver.

16 You know, just to give, you know, an
17 example, I think Mr. Forge talked about, you
18 know, the knowledge of an individual.

19 You know, if someone, a 30(b)(6)
20 witness, talks about state of mind, he says,
21 that's a waiver, right? So -- and he said -- you
22 know, we pointed to documents that show that
23 person's state of mind and he says, well, that
24 can't count because, you know, it's a waiver.
25 You've talked about state of mind. You can't

1 know that from a document.

2 You know, look, one of the statements
3 they point to is by someone called Mark Hayden.
4 And, you know, he said the statement is basically
5 along the lines of, you know, Mr. Hayden approved
6 some payments and knew that these payments were
7 for no purpose at all.

8 This literally comes from a
9 nonprivileged email on which, you know,
10 Mr. Hayden is on talking about exactly what is in
11 the testimonial aid. There's not some -- you're
12 not revealing some secret thing here. We're just
13 simply providing what is already in the
14 testimonial aid.

15 And to the extent that there are some
16 conclusions in the testimonial aid, you know, the
17 law is clear that a conclusion from an
18 investigation is not some kind of waiver. That
19 the Texas Hydraulics case, for example, said that
20 where, you know, there it was evidence summaries
21 and ultimate conclusions.

22 And the Court said, well, because you're
23 not -- you didn't give the underlying rationale
24 by the lawyer, the communications with the
25 lawyer, that's not a waiver.

1 And so, you know, this is no different
2 to cases like that. And we cite a number:
3 Dayco, Schroeder, that fall along those kinds of
4 lines.

5 And, finally, I want to point out, there
6 also has not been any kind of selective
7 disclosure here, all right? This is not a
8 situation where we have come in and said, well,
9 you know, we win because the internal
10 investigation found this, right? That would be a
11 classic selective disclosure. You're trying to
12 get -- you're using it to -- for purposes of
13 establishing your defense or, for that matter,
14 your claim. That's a selective waiver.

15 That's not what we've done. And they
16 haven't, you know, pointed to anything like that
17 at all. You know, at most, they're saying, you
18 know, there's -- the testimonial aid said
19 something like, you know, the board took decisive
20 action. You know, that's not our defense. We've
21 never said the board taking decisive action is
22 some sort of -- you know, is our defense here.

23 And it's just -- it really is not even
24 close to some sort of selective waiver case,
25 right? The selective waiver cases talk about the

1 sword and the shield, right? And the sword
2 being -- using the privileged things
3 affirmatively to win.

4 We haven't done that. We're not doing
5 that. It's not what the internal investigation
6 is for. It's not -- we haven't used it in the
7 case that way to get any kind of litigation
8 benefit.

9 So, you know, the bottom line is, we
10 think these investigations are very clearly
11 covered by attorney-client privilege, covered by
12 work product. We don't think there's any waiver
13 at all. And we think what is being requested
14 here is really extraordinary. There's no case
15 like it where anything like this has been
16 granted, certainly not in such an extreme way.

17 And we think we fully substantiated the
18 basis for the privilege, the basis for the work
19 product, and the reasons why none of these
20 grounds for supposed waiver apply.

21 You know, in the end -- you know, we
22 said this last week. This is an important issue
23 to us, and I'm sure -- because -- and I'm sure,
24 you know, it is to all parties in this kind of
25 situation. These are our lawyers' advice, our

1 lawyers' analysis. No party wants to hand over
2 its lawyers' communications and its lawyers'
3 analysis. That isn't how litigation works. And
4 if that, you know, were to happen, obviously, it
5 would be very complicated even physically to do
6 it over, you know, two investigations, including
7 one law firm that's not involved in this case,
8 each over at least a year, and, you know, likely
9 will lead to more disputes.

10 If it would have happened, plaintiffs
11 have said it's going to lead to reopening of
12 depositions. Maybe there will be more discovery
13 requests. I don't know. But it certainly would
14 needlessly complicate the case, needlessly add to
15 what's going on here in discovery.

16 And it's just -- and just as a practical
17 matter, completely unnecessary in circumstances
18 where we are providing the underlying
19 information. We're providing what has happened.
20 We're not standing in the way of that at all.
21 And we think the case should be focused on that,
22 not on trying to get the adversary's legal
23 analysis and communications.

24 So thank you. Happy to address any
25 questions.

1 MR. JUDGE: Thank you, Mr. Rein.

2 Mr. Forge?

3 MR. FORGE: Thank you, Mr. Judge.

4 We -- I think you actually got to the
5 heart of the issue regarding the facts.
6 Everything was going along swimmingly. According
7 to Mr. Rein, facts are not privileged, even
8 though they literally said the opposite of that
9 during a deposition. Facts are not privileged.
10 Of course they're not privileged. We all agree
11 they're not privileged.

12 And then you basically said, oh, okay,
13 so then they can ask witnesses about facts even
14 if they learned them from lawyers.

15 Whoa, whoa, whoa. Hold on a second.
16 No, they can't do that.

17 This is exactly my point. They are
18 disclosing facts that came from lawyers. It's in
19 the DPA. They are in those 30(b)(6) scripts.
20 If -- and yet Mr. Rein has now said that's all
21 privileged information.

22 Well, they've disclosed it. That is a
23 waiver. They can't take the facts that came from
24 lawyers and disclose them to the world and then
25 tell the witnesses who received the same exact

1 facts from the same exact source that you can't
2 discuss it. That is exactly what we're talking
3 about here, and you got to the heart of it with
4 that question.

5 The bottom line on this issue is, they
6 used lawyers for nonlegal purposes. They used
7 them to gather facts precisely for this purpose,
8 not to, not to render legal advice. The legal
9 advice is when you take those facts, process it,
10 and come up with a conclusion. For example,
11 Chuck Jones knew that there was no justification
12 for money going to Tony George.

13 Now, I'm going to actually carry Chuck
14 Jones's water for a little bit here. And Carole
15 can, you know, correct me if I'm not doing a good
16 enough job. But let's look at things from his
17 perspective and how it works out in this case.

18 FirstEnergy says publicly that Chuck
19 Jones violated its code of conduct. FirstEnergy
20 says publicly that Chuck Jones violated
21 FirstEnergy's policies. That -- those
22 conclusions came from lawyers and they've
23 revealed it.

24 Mr. Rein is just wrong on this notion
25 that, oh, you could say what the lawyer

1 concluded. That doesn't, that doesn't waive
2 anything. That's not true. That is -- I don't
3 know how you can get a more quintessential mental
4 impression than a lawyer taking facts and then
5 processing those facts and reaching a legal
6 conclusion as to whether or not policies or codes
7 of conduct were being violated.

8 The notion that they can just disclose
9 that conclusion -- and I know -- I'll just say it
10 for Carole. Mr. Jones is not conceding that
11 point. The fact that they can disclose that
12 conclusion but then hide behind the privilege or
13 whether it's privilege or work product protection
14 to justify it just doesn't square with the cases.

15 I agree this case is highly unusual, if
16 not unprecedented, by virtue of the extent of the
17 disclosures. Typically, when you have these
18 types of disclosures, it's to wrap up the entire
19 case. They've made all these disclosures during
20 this litigation. And in terms of specific
21 points, Mr. Rein said that the law is settled
22 regarding work product not waived to share with
23 the auditor.

24 That's not true. The only two district
25 courts in the Sixth Circuit to address that issue

1 we identified was the First Horizon case and the
2 King Pharmaceuticals case from the I'd say
3 Western District and the Eastern District of
4 Tennessee respectively. They both said the
5 opposite. Disclosure to an auditor does waive
6 work product protections. So if there's no
7 dispute, there's no dispute that in the Sixth
8 Circuit it is a waiver.

9 The contention that the selective waiver
10 doesn't apply because all they said was the board
11 took decisive action simply is not accurate.
12 What they said was the board and others weren't
13 aware of this conduct and took decisive action
14 immediately upon, you know, being informed of
15 this conduct.

16 So that's two representations that
17 they're making. Number one, they're making a
18 very broad representation that none of the boards
19 or -- none of the board members or other officers
20 were aware of this information prior to a period
21 after the arrests.

22 Well, that is an affirmative
23 representation to -- in their own defense.
24 That's defending the board members. That's
25 defending their other officers, which is the same

1 exact thing as defending themselves. So it is
2 the equivalent of a witness saying I didn't know
3 any of this information until after July of 2020.
4 And as soon as I learned of that information, I
5 took decisive action.

6 Well, that is -- that's sword and shield
7 right there, because the board -- or not being
8 aware of the information, that is a conclusion
9 from the lawyers for the lawyers to say we
10 conducted this extensive investigation and we are
11 concluding that the board wasn't aware of it.

12 So during all these points where you
13 have allegations during the class period, the
14 board and the other officers weren't aware of
15 anything, how can you get more of a conclusion, a
16 legal, a mental impression than that conclusion?
17 They're using that affirmatively to defend
18 themselves because their liability is vicarious.
19 It's vicarious through the board. It's vicarious
20 through their officers. And they are saying both
21 of those categories of people were not aware of
22 this information. That conclusion did not come
23 from the individuals. That came from FirstEnergy
24 based exclusively on its lawyers' conclusions.

25 And Mr. Rein -- and I appreciate --

1 corrected me. It was Mark Hayden, not Bradley
2 Bingaman about whom the -- they revealed their
3 lawyers' conclusions. Again, the statement in
4 the 30(b)(6) script was not in, in an email from
5 2015. Mark Hayden wrote X. No. The statement
6 was an affirmative statement that one of the
7 reasons why this individual was separated from
8 the company was because he facilitated, was
9 complicit in payments to Sam Randazzo even though
10 he knew Sam Randazzo was doing nothing for the
11 company. That's a conclusion.

12 And you heard it time and time again
13 when Mr. Rein was speaking. There's -- you can't
14 make any sense of their position because they
15 take different -- depending on whether they
16 disclose something, it's not a mental impression
17 that witnesses weren't candid? There were
18 multiple witnesses in that attorneys -- Ebony
19 Yeboah, Robert Reffner, he's a defendant in this
20 case. These are individuals in this case who
21 they're stating weren't candid. That's a mental
22 impression.

23 So I don't understand how Mr. Rein is
24 possibly saying these ultimate conclusions -- you
25 know, first of all, they're, they're individual

1 conclusions. They're individual assessments.
2 What would be -- what, what would be a mental
3 impression -- if your impression about what
4 somebody knew or somebody's candor is not a
5 mental impression, what is? That is, that is the
6 quintessential mental impression. This witness
7 can't be trusted. That's -- you know, that's
8 going back, you know, decades in Supreme Court.
9 That's Hickman kind of stuff that we're talking
10 about.

11 And I want to just -- along those same
12 lines, you know, they did the same thing with
13 Chuck Jones, as I mentioned earlier, you know,
14 with the payment to Tony George; that Chuck
15 George -- Chuck Jones knew there was no support
16 for this payment to Tony George. There was a
17 \$900,000 payment to Tony George that they put in
18 their script, disclosed to us, and had the
19 witness testify that Chuck Jones approved of the
20 payment even though he knew there was no support
21 for it. Well, I know Chuck Jones didn't tell
22 them that. So they're not repeating something
23 Chuck Jones said.

24 So, once again, that is a conclusion
25 that a lawyer reached that they have disclosed.

1 That's a waiver.

2 And Mr. Special Master, I have the --
3 just to drive home the point you were making
4 regarding these facts, let me just read to you
5 from the Strah deposition. These are questions
6 about the reason for Dennis Chack's firing from
7 FirstEnergy.

8 And just for the record, I'm talking
9 about now -- I'm referring to page 53 of the
10 rough transcript of the September 22nd, 2023,
11 deposition of Steven Strah.

12 And the question was asked: Prior to
13 you being named as acting CEO, you were informed
14 by FirstEnergy internal counsel the reason for
15 Mr. Chack's firing; is that correct?

16 And then counsel objects; says, to be
17 clear, that interaction, interaction with
18 internal counsel provided underlying facts
19 associated with Mr. Chack.

20 Then the question is asked: What were
21 the underlying facts that were told to you about
22 the reason for Mr. Chack's firing?

23 Objection and instruct the witness not
24 to answer.

25 Then there's an exchange between

1 counsel.

2 You're instructing him not to answer the
3 question on behalf -- of what were the underlying
4 facts?

5 Response from FirstEnergy: That were
6 conveyed to him by counsel, yes, if that's the
7 sole source of his knowledge of those facts.

8 Now, keep in mind, Mr. Strah was the
9 acting CEO at this time, so he is endorsing and
10 making human resource decisions. So there are
11 decisions being made at FirstEnergy based on
12 these facts.

13 So then when he's asked whether he was
14 seeking legal advice -- is this communication
15 which you were told facts about Mr. Chack's
16 firing, were you seeking legal advice when those
17 facts were conveyed to you?

18 He's told that's just a yes-or-no
19 question.

20 Answer: No, he was not seeking legal
21 advice.

22 So you were being told of the fact of
23 this firing and the reasons therein, but you
24 weren't asking the lawyers for any advice, right?

25 And then he says no, but -- no, he

1 wasn't acting on advice.

2 Were you seeking any legal advice as
3 part of a communication on which you were told
4 the facts of Mr. Chack's firing?

5 Answer: No.

6 So then, again, as I mentioned earlier,
7 sensing, sensing there was a problem, that same
8 lawyer for FirstEnergy then asks him if the
9 review of employee conduct involved legal issues,
10 and he says yes.

11 So now I'm skipping ahead to 263 of that
12 rough transcript. When -- now we're on re-cross.
13 When Ms. Newton was asking you questions, she
14 asked you, she said: But, as far as you knew,
15 did that review of employee conduct involve legal
16 issues?

17 Do you remember that testimony a moment
18 ago?

19 Yes.

20 What were those legal issues that the
21 review of employee conduct involved?

22 And to the -- and this is the objection:
23 To the extent the witness's understanding of the
24 specifics of this with counsel, he should not
25 disclose that.

1 Okay. So this is a question just asked
2 to you by FirstEnergy's lawyer, correct? She
3 solicited that testimony; is that right?

4 I answered her question, yes.

5 Well, did you know that the internal
6 review related to the legal issues from anyone
7 other than a FirstEnergy lawyer?

8 No.

9 So when you told us that the review
10 involved legal issues, you were telling us
11 something you learned from a FirstEnergy lawyer
12 containing all relevant facts. Do you remember
13 that question?

14 Yes.

15 So, so here we have just last week, sir,
16 they're playing both sides of this issue. When
17 we ask for facts that were communicated to the
18 witness by a lawyer, they shut it down and
19 wouldn't let him answer the question. But when
20 they ask for facts that were communicated by the
21 lawyer, it's fine.

22 So this is just -- and the only reason
23 I'm bringing it up, it's not because it's the
24 most egregious; it's just the most recent. And
25 it is also typical. That is what is happening

1 time and time again. Facts they obtain from
2 lawyers are disclosed, but when we ask them about
3 it, they're off limits.

4 MR. JUDGE: Anything else, Mr. Forge?

5 MR. FORGE: No. But, again, I would
6 just invite any of the others who are a part of
7 this motion if they have something that I missed,
8 I'd be happy to address it or let them address
9 it.

10 MR. JUDGE: Does any other counsel have
11 any additional information they would like to
12 add?

13 MR. MCCAFFREY: Nothing on behalf of
14 Mr. Dowling.

15 MR. JUDGE: Thank you.

16 MS. RENDON: Not on behalf of Mr. Jones.
17 Thank you.

18 MR. JUDGE: Thank you.

19 THE REPORTER: Who was that?

20 MS. RENDON: I'm sorry. That was Carole
21 Rendon on behalf of Mr. Jones. Sorry, Kristin.

22 THE REPORTER: Thank you.

23 MR. MIARMI: And not on behalf of the
24 direct action plaintiffs. This is Michael
25 Miarmi.

1 MR. JUDGE: Thank you, Mr. Miarmi.

2 Mr. Forge -- yeah, go ahead.

3 MR. REIN: If you have more questions
4 for Mr. Forge, please go ahead. I was going to
5 ask if I could respond briefly.

6 MR. JUDGE: Go ahead. Yeah, you go
7 ahead.

8 MR. REIN: Okay. And I will be brief,
9 but I do want to address some points that
10 Mr. Forge made.

11 You know, I think most of that response
12 was about the issue of sort of, you know, when is
13 a fact disclosable, you know, when discussed with
14 a lawyer, and I think it's two -- at least two
15 points I would make on that.

16 Number one is if there's an issue with
17 an instruction such as the colloquy that
18 Mr. Forge is describing, then the remedy is to
19 address that instruction if it's incorrect. But
20 that is not -- the remedy is not just hand over
21 every communication with your lawyer or all of
22 your lawyers' files. That's not -- that
23 wouldn't -- and that's not relief they've sought
24 here. And they haven't -- you know, they haven't
25 even, of course, raised this most recent colloquy

1 in any motion paper at all. So, you know,
2 totally new.

3 But let's just sort of put it into a
4 more practical way of thinking about this, which
5 is, you know, as lawyers, we all speak with
6 clients and, you know, sometimes you could say to
7 a client, you know, I need to advise you, you
8 face potential liability because of facts A, B,
9 and C.

10 And, you know, that's sort of
11 after-the-fact discussion with a lawyer, and it
12 doesn't mean that A, B, and C, now the person who
13 has been having that discussion with their lawyer
14 maybe didn't know about A, B, and C or did not
15 know. In fact, did not know about A, B, and C
16 beforehand, that they then have to disclose A, B,
17 and C to the other side.

18 Now, we're not blocking getting A, B,
19 and C if you can -- you know, allowing all -- you
20 know, get those communications about what
21 happened at the time, the documents about what
22 happened at the time. We're not saying facts A,
23 B, and C are privileged. What we're saying is
24 the communication with the lawyer.

25 And if that's how you exclusively

1 learned of the fact, that's why that
2 communication is privileged, because it's the
3 context that counts there. It doesn't immunize
4 the fact from discovery. We're not saying that.

5 And then, you know, secondarily, I think
6 Mr. Forge is suggesting that we're then using
7 this as some sort of sword, but we're not.

8 Right? All of these things he's referred to, you
9 know, employment actions, whatever else, we're
10 not -- those are not things that we've said, oh,
11 you know, we should win the case because of some
12 finding in an investigation or any of these
13 points he's referring to. They're somewhat, you
14 know, arcane issues, really. You know, I'm sure
15 they're important to the individuals involved,
16 but they're not, they're not, you know, where
17 we're using it as some sort of sword to win our
18 claim or anything like that.

19 And so, you know, the facts that these
20 things get, you know, revealed in a deposition
21 can then be used as leverage. And I think one
22 important context of that is that this -- there
23 were two rounds of 30(b)(6) deposition. There
24 was a first round, and the judge said it needs to
25 be more specific; needs to be -- you know,

1 FirstEnergy should give more information about
2 its knowledge. We're ordered to do that, and so
3 we did that.

4 And this deposition they're referring
5 to -- not the Strah one, the one where they're
6 saying we made -- you know, used the testimonial
7 aid and so on. This was because we were ordered
8 to give more information about FirstEnergy's
9 knowledge. And then we do that and they turn
10 around and say, well, you've spoken about
11 FirstEnergy's knowledge, now there's waiver.

12 And, you know, this feels like a gotcha
13 game. And, you know, we're trying to be
14 cooperative. We're trying to give information
15 about knowledge but, at the same time, you know,
16 we don't think that the way this should work is
17 that we do so and all of a sudden this is, you
18 know, some giant waiver when now they get to get
19 to all of the lawyers' files.

20 And just to sort of turn to one other
21 point raised by Mr. Forge. You know, he said
22 that the case law -- he doesn't agree with the
23 case law on sharing of work product with
24 auditors, not waiving work product. You know,
25 the Deloitte case is very clear on that. It was

1 then cited by the Sixth Circuit with approval in
2 the new Phoenix case.

3 So the Sixth Circuit has, you know,
4 addressed this. And I think across the country,
5 actually, in every circuit that I'm aware of,
6 the, you know, circuits agree with this on
7 auditor work product issues.

8 The cases he is referring to are
9 situations where the information provided to an
10 auditor was itself public. We're obviously not
11 saying public information is privileged, right?
12 That's not what we're saying. If something is
13 out there in the public, of course, you know,
14 that's not privileged. That's not what we're
15 saying. But, you know, sharing confidentially
16 with an auditor, you know, that is protected by
17 work product, and I think the law is very solid
18 on that question.

19 So, you know, happy to address any other
20 questions.

21 MR. JUDGE: I appreciate that. And I
22 appreciate both sides' arguments here.

23 I will say, Mr. Rein, the issue of when
24 a fact is discoverable and how that fact came
25 into the knowledge of the recipient, I

1 understood -- I think I understood your argument
2 a lot better in your last rebuttal here than I
3 did your first time around. Not a criticism of
4 you. I know you were just presented with the
5 Strah depo transcript today and, you know, you're
6 thinking on your feet as you go.

7 Well, one thing that -- God help me --
8 your comment a moment ago -- this made me think
9 because you said there was no opportunity for
10 briefing on this issue. They just raised it now.

11 You know, the last thing in the world I
12 want to do is add to the pile of -- I think it's
13 five briefs on this issue. But I will say this:
14 My first impression of your argument, your
15 response to that, it seemed very lawyerly to the
16 extent that I was not sure exactly what you were
17 saying.

18 I think, having heard your rebuttal, I'm
19 much more clear on your position. I'm not saying
20 I agree with that position or disagree with that
21 position, but I think I understand it more. But
22 I also want to afford the parties time for
23 thoughtful consideration, too.

24 I know I'm going to regret this because
25 it opens the door to a lot of nonsense later on,

1 but if I were to have each side brief that simple
2 issue for me, the fact issue as discussed today
3 and as within the contours of the new evidence
4 that was raised today, how many pages do you need
5 to do that and how soon could you get it to me?

6 MR. FORGE: Mr. Judge, can I --

7 THE REPORTER: I can't hear you.

8 MR. JUDGE: You're on mute, sir.

9 MR. FORGE: Sorry.

10 May I make a suggestion that might avoid
11 the need for any additional briefing?

12 MR. JUDGE: By all means.

13 MR. FORGE: Let's -- I'm going to take
14 Mr. Rein's statement at face value. He said the
15 facts are not privileged. The only thing that's
16 privileged is the communication from the lawyer
17 to the client about those facts.

18 Why don't we just depose the lawyers?
19 We'll depose the lawyers about the facts which
20 are not privileged.

21 MR. REIN: Well --

22 MR. FORGE: And we won't discuss
23 anything about their communications of those
24 facts to the client. Just the facts.

25 MR. JUDGE: David?

1 MR. REIN: Information developed through
2 a work product investigation unknown to a lawyer
3 is something protected by work product, right?
4 That's classic work product. You know, what does
5 a lawyer know.

6 A lawyer isn't a party. A lawyer is not
7 a witness to what happened. Right? We're
8 talking about people who have come in. Squire
9 was actually chosen because they had had no
10 involvement with FirstEnergy, or virtually none.

11 And so, you know, they're not witnesses.
12 They're lawyers. It would be like me saying,
13 well, I'm just going to depose Jason about facts
14 he knows about the case that he's developed. You
15 know, that's not privileged. That's not work
16 product. I mean, that, that plainly falls within
17 classic privilege, classic work product. That is
18 not a solution.

19 I mean, we're certainly happy to, you
20 know, address this now or a question. If that's
21 what this motion is now boiling down to, sort of
22 a question of, you know, what is a proper
23 instruction with respect to, you know, how a
24 deponent should address information learned from
25 counsel and exclusively from counsel, you know,

1 we're happy to, to brief that. And, you know,
2 I'm glad if that's -- you know, I think that's a
3 constructive way to try to, you know, advance
4 things. We're certainly happy to do that and to
5 do it in relatively short briefs. Obviously, the
6 plaintiff is the proponent of that. So if they
7 tell us they need X pages, I'm sure, you know,
8 we're likely to agree to the same. But, you
9 know, I think that's, you know, a constructive
10 avenue for trying to move this forward.

11 MR. JUDGE: Mr. Forge, my reaction to
12 your proposal, as much as I'd like to bind to
13 something to avoid any additional briefing and
14 reading on my part, my gut reaction is nice try.
15 But I, I could not imagine what that depo would
16 look like if you're deposing the lawyers. I
17 think I would just have to go to the depo because
18 I think you guys would be calling me every five
19 minutes.

20 MR. FORGE: Well, I think it would be,
21 it would be a matter of -- and we're talking
22 about facts. Again, we're talking about facts
23 that they've disclosed. So it would be a matter
24 of -- and, again, they're saying these facts are
25 not privileged. So it would be a matter of just

1 simply laying the foundation for these facts.

2 Again, they're playing both sides of
3 this thing. And by doing it this way, they're
4 essentially taking these facts out of the case
5 because they're saying we can't, we can't
6 question the people who discovered these facts
7 and we can't question the people with whom they
8 shared these facts, so what else are we left
9 with? I mean, what else can we do? You know,
10 they have to give us somebody because they've
11 certainly disclosed these facts.

12 So either they give us the people who
13 received these facts or they give us the people
14 who uncovered these facts. But I don't see how
15 they can -- you know, I'm happy to submit
16 additional briefing, but I don't think we really
17 need to because I think we've reached a point now
18 where they've got to pick. Either get the people
19 who received -- either give us the people who
20 received the facts, and they could discuss those
21 facts with us, or give us the people who
22 generated those facts and they could discuss
23 those facts with us.

24 But, otherwise, they're saying we're not
25 entitled to ask anybody about the facts.

1 MR. REIN: This is just absolutely not
2 correct, right? They are entitled to ask people
3 about the facts, and they have done so. They've
4 been doing this consistently. There's no
5 blocking of the facts. They have the documents
6 and can ask the documents [sic] about the facts.
7 They have witnesses and they can ask witnesses
8 about the facts. And they've spent many hours
9 asking witnesses about the facts and learning
10 about the facts that way, right? That's how
11 lawyers build cases. That's what they've done.

12 Saying you go to the next level and you
13 ask the lawyer about the facts, that's not how
14 it's done. If I want to depose Jason's client, I
15 can ask the client about facts, but I don't go to
16 Jason and depose Jason about what he's learned
17 from his client about the facts, right, because
18 that is classic work product. It's classic
19 privilege.

20 And so we're very happy to brief this
21 issue. I think it sounds like it would be very
22 helpful in just crystalizing the issue, and I'm
23 sure we could do so rapidly and I'm sure we could
24 do so quickly, as I know you are keen to resolve
25 this, you know, rightly and to do so promptly.

1 And, you know, we're very happy to do that.

2 I mean, I'd suggest maybe, say, ten
3 pages a side and, you know, some fairly, you
4 know, a rapid briefing schedule. And we can, you
5 know, put all of this in front of you, crystalize
6 the issues on that and join issue.

7 MR. JUDGE: My thought was -- I was
8 thinking less than ten pages, but sure, ten pages
9 per side. I think concurred briefing with the
10 same deadline. No response permitted. And I
11 think -- how soon, how soon do you need? How
12 long?

13 MR. FORGE: I don't know what we're
14 briefing. My only -- my issue on this front is
15 very simple: Are they allowed to tell witnesses
16 not to answer questions if the facts that would
17 be responsive to the question came from a lawyer.

18 MR. JUDGE: That's part one of your
19 brief.

20 MR. FORGE: Yeah. So okay. So if
21 that's --

22 MR. JUDGE: Yeah. Part two of your
23 brief, if you want to raise the issue, would be,
24 well, if we're not allowed to ask those
25 witnesses, can we depose the attorneys.

1 MR. FORGE: Okay. You got it.

2 MR. JUDGE: So yeah. I mean, it's --
3 those were the two issues that sort of developed
4 today. I think they could both be addressed
5 within ten pages. These are not -- you're not
6 going to find a lot out there, I think, on these
7 issues, you know, in terms of case law, but I
8 would be interested in any case law and any
9 secondary sources you can find.

10 But I would want a clear articulation of
11 each party's position. I think I understand you
12 well, but I want it in writing and I want some
13 considered thought into it.

14 Because it seems to me that, you know,
15 if it's as easy an overlap as everyone is
16 suggesting, you know, a series of stipulations
17 can take care of a number of these issues, you
18 know. Some agreement between the parties can
19 take care of some of these issues.

20 But, you know, my inclination, my -- let
21 me try to couch this carefully. My overarching
22 inclination at this point is that somebody has to
23 answer to the facts, and asking counsel about
24 them is a very novel proposition to me. And
25 questioning the witnesses involved, sure, but

1 when the witnesses learn the facts only from
2 counsel involved, it gets a little more murky.

3 You know, Mr. Rein's original answer to
4 me was more -- murkier than I hoped in clearing
5 it up, but I understand his position a little
6 better now. I will understand I think the
7 position much better when everyone has time to
8 put it to writing and think about it and polish
9 it.

10 So for ten-page briefs, concurrent
11 briefs on the issue, how quickly can you get it
12 to me? And give yourself enough time that -- you
13 know, I don't want you to abuse your associates
14 with their working, you know, overnight on this.
15 A realistic timetable, but promptly, how soon?

16 MR. REIN: Could I, could I suggest --
17 and I'm a bit worried that we won't join issue
18 with one another and that we'll be ships passing
19 in the night to a degree; although, your
20 articulation of the two questions was helpful.

21 Could I suggest instead we do staggered
22 but do so quickly? So, for example, you know,
23 plaintiffs get a week, we respond in a week?

24 MR. JUDGE: No. Concurrently.

25 MR. FORGE: One week is fine for both

1 sides. And I think, you know, Mr. Judge, you
2 just stated the two issues. We're not going to
3 pass in the night. We're going to address those
4 two, those two questions.

5 MR. JUDGE: Yeah. If, in reviewing your
6 notes of this hearing and all the attorneys
7 involved and looking at the expedited transcript
8 that you would likely order, if there's a lack of
9 clarity as to what the two issues are, contact
10 me, copying both sides, and we will discuss that.
11 We can jump on a call and we can hash it out.

12 But I think the issues are fairly clear;
13 the answers are less clear. But, to me at least,
14 the issues are pretty simple issues. It's a
15 pretty simple issue, but it's going to be
16 difficult to research, I think, however.

17 So but ten days. There's ten pages
18 within you said a week. So by next Thursday,
19 close of business, the briefs could be in to me?

20 MR. FORGE: Yes for plaintiffs.

21 MR. JUDGE: And I want to be fully
22 transparent with you. My goal would be to get a
23 decision out by that Monday or Tuesday. So the
24 briefs are going to be due on the 5th. I'm
25 getting my COVID vaccine on the 6th. Everybody

1 tells me I will be dead on the 7th and then
2 suddenly spring back to life sometime on Sunday
3 after the vaccine. So I hope to get something
4 out to you that Monday. If it takes until
5 Tuesday or, God forbid, even Wednesday, it's not
6 that I've forgotten about you or you've slid down
7 the rank of importance; it's simply because I'm
8 down and out on my back for a day on the couch.

9 In terms of our next -- and I thank you
10 for your arguments today. This has been helpful
11 and illuminating, and I think we're going to be
12 able to knock out, you know, at least five of the
13 pending briefs, you know, pretty, pretty quickly
14 here.

15 We do have the issues with Energy Harbor
16 and the motion to compel from the nonparties, as
17 well, that we need to deal with, as well as the
18 issues raised in the joint status report.

19 Let's go off the record now.

20 THE REPORTER: Okay. Off the record.

21 (Discussion off the record.)

22 (Conference concluded at 12:55 p.m.)

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1 CERTIFICATE

2
3 The State of Ohio,)
4) SS:
5 County of Cuyahoga.)
6

7 I, Kristin Wegryn, a Notary Public
8 within and for the State of Ohio, duly
9 commissioned and qualified, do hereby certify
10 that the proceedings given was by me reduced to
11 stenotypy, afterwards transcribed, and that the
12 foregoing is a true and correct transcription of
13 the proceedings given.

14 I do further certify that this
15 proceeding was taken remotely at the time and
16 place in the foregoing caption specified and was
17 completed without adjournment. I do further
18 certify that I am not a relative, counsel or
19 attorney for either party, or otherwise
20 interested in the event of this action.

21 IN WITNESS WHEREOF, I have hereunto set
22 my hand and affixed my seal of office at
23 Cleveland, Ohio, on this 29th day of September
24 2023.
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1000



24 Kristin Wegryn, RMR, CRR
25 Notary Public State of Ohio
Commission expiration: July 23, 2028

[& - 600]

Page 1

&	2000 5:5	216.696.2678	4
& 2:4,10,14,22 3:3,8,12,21 4:8 4:12 5:4 6:15 6:19 7:3,8,13	20001 6:16 20005 4:13 2015 52:5 2019 40:2 202.349.8065 4:14	7:20 21st 14:1 2232 75:21 22nd 54:10 23 75:25 250 3:8,16 6:19 263 56:11 27 28:1 275 3:12 28 1:14 28th 9:17 2900 7:14 29th 3:13 75:16 2:20 1:4 9:20	4000 7:4 41 7:13 415.956.1000 3:14 43065 3:4 43214 3:17 43215 2:19 5:23 6:8 7:14 44113 7:20 44114 5:6 6:12 44124 4:4 44308 5:18 8:4 44311 4:18 444 7:3 450 7:9 45202 4:9
1		3	5
10 10:18 10004 3:22 10013 3:9 10017 7:10 10019 6:20 1100 7:19 1114 2:18 1152 4:12 11747 2:15 11:00 1:14 11:18 9:18 11th 7:9 1200 5:18 125 3:22 127 5:5 12:55 74:22 150 3:4 15th 4:12 1650 2:11 17 28:21 1701 2:23 1735 5:12 1900 2:5 19103 2:23 5:13	202.942.5631 6:16 2020 10:13 14:1 40:2 51:3 2021 34:14 2023 1:14 9:17 54:10 75:16 2028 75:25 21 25:2 28:9 212.355.9500 3:10 212.450.3976 7:10 212.558.4000 3:23 212.836.7123 6:20 215.665.8500 5:13 215.963.5000 2:24 216.304.4970 4:5 216.586.3939 6:12 216.621.0200 5:6	30 41:16 42:19 47:19 52:4 61:23 30326 2:11 30799 4:3 312.984.5380 7:5 325 6:7 330.208.1000 5:19 330.535.5711 4:19 330.690.4496 8:4 3424 2:10 345 4:4 3785 1:4 9:20 388 4:17	50 5:17 500 4:18 513.721.4450 4:10 51st 5:12 52 5:22 53 54:9 55th 6:19 58 2:14 5th 73:24
2			6
200 2:15			6 41:16 42:19 47:19 52:4 61:23 600 4:8 6:7

[601 - aim]

Page 2

601 6:15	a	66:9	55:14,16,21,24
60606 7:4	a.m. 1:14	add 22:25 23:3	56:1,2
6128283 1:23	aaron 6:18	23:4,6 34:18	advise 24:24,25
614.227.2000	aaron.miner	46:14 58:12	40:6 60:7
7:15	6:21	64:12	advising 38:23
614.281.3655	abingdon 27:21	addison 6:2	affidavit 26:5
6:8	able 25:14	addition 10:16	27:25
614.462.2319	74:12	additional 9:11	affirmative
3:17	absolutely	11:11 58:11	50:22 52:6
614.464.6250	24:10 35:25	65:11 67:13	affirmatively
5:23	36:4 38:8 42:5	68:16	45:3 51:17
614.488.0400	69:1	address 9:4	affixed 75:15
2:19	abuse 72:13	10:4 22:18	afford 64:22
614.763.2316	accept 39:6	46:24 49:25	ago 56:18 64:8
3:5	access 14:16,22	58:8,8 59:9,19	agree 13:12
619.231.1058	35:25	63:19 66:20,24	47:10 49:15
2:6,12,16	accurate 50:11	73:3	62:22 63:6
655 2:5	acting 21:25,25	addressed 63:4	64:20 67:8
6th 73:25	54:13 55:9	71:4	agreed 15:10
7	56:1	adjournment	36:25
700 4:9	action 1:4 3:7	75:12	agreement 15:9
76 8:3	23:9 26:20	admissions	17:16 71:18
7th 74:1	44:20,21 50:11	17:24	agreements
8	50:13 51:5	admitted 22:7	34:15
8th 3:9	58:24 75:14	advance 67:3	ahead 39:12
9	actions 1:6	adversary	56:11 59:2,4,6
900,000 53:17	31:7 61:9	29:13 35:2	59:7
901 6:11	actual 12:2	adversary's	aid 41:12,17
92101 2:6	21:25 22:21	24:6 46:22	42:8 43:11,14
94111 3:13	26:3	adverse 35:4	43:16 44:18
950 7:19	actually 11:19	advice 16:8,9	62:7
9980 3:3	21:13 27:9,10	25:16 26:22	aided 13:8
	31:4,4 32:4	27:10 28:7	aids 18:10
	34:11 47:4	37:22 39:24	aim 41:5
	48:13 63:5	45:25 48:8,9	

[air - b]

Page 3

air 10:24 akron 4:18 5:18 8:4 align 31:24 allegations 24:21 30:20 31:6,8 39:16 51:13 allowed 17:12 70:15,24 allowing 19:18 35:25 60:19 alternative 32:17 amount 26:12 analysis 26:22 28:7 41:1 46:1 46:3,23 analyze 24:24 ancillary 33:4 33:14 anderson 6:3 andrew 2:13 5:16 6:14 andrew.johns... 6:17 answer 16:24 18:6 36:20 54:24 55:2,20 56:5 57:19 70:16 71:23 72:3 answered 57:4 answers 73:13	anticipated 26:2 anybody 68:25 anymore 40:11 anyway 30:23 32:14 apguran 5:19 apparent 10:9 10:21 apparently 35:10 appearances 2:1 3:1 4:1 5:1 6:1 7:1 8:1 appeasing 17:23 apply 45:20 50:10 appreciate 22:10 23:1,14 51:25 63:21,22 approach 25:12 approval 63:1 approved 43:5 53:19 arcane 61:14 argument 9:23 35:9 64:1,14 arguments 63:22 74:10 arnold 6:15,19 arnoldporter.... 6:17,21,21	arose 19:17 arrests 10:14 13:13 50:21 arthur 7:13 articulation 71:10 72:20 artificial 31:10 asked 16:5,14 16:19 17:4 54:12,20 55:13 56:14 57:1 asking 20:3,5 24:3 37:17 38:25 55:24 56:13 69:9 71:23 asks 56:8 aspect 11:25 16:6 asserting 19:21 assertion 13:9 assessing 13:9 assessments 53:1 assisting 12:3,4 associated 54:19 associates 72:13 assuage 11:2 26:16 27:24 assume 35:8 assurance 11:16	atlanta 2:11 attacking 19:17 attorney 11:18 12:12 25:5 39:21,23 45:11 75:13 attorneys 52:18 70:25 73:6 auditing 35:5 auditor 10:19 29:5,10,13,18 30:1,4,9 34:21 34:22 35:4 49:23 50:5 63:7,10,16 auditors 62:24 authorized 29:20 avenue 6:11,15 7:9,19 67:10 avoid 65:10 67:13 await 28:14 aware 13:21 19:5 20:13 21:4 50:13,20 51:8,11,14,21 63:5 axelrod 5:10 22:1,2 axelrodd 5:14 b b 41:16 42:19 47:19 52:4 60:8,12,14,15
--	---	---	---

[b - case]

Page 4

60:16,18,23 61:23 back 16:12 23:23 27:15 36:1,6 38:14 53:8 74:2,8 baker 5:4 bakerlaw.com 5:7,7,8,8 ball 23:15 ballard 5:11 ballardspahr.... 5:14,14 barrage 28:15 based 27:8 34:7 41:4 51:24 55:11 basic 23:24 basically 43:4 47:12 basil 2:18 basis 45:18,18 battery 3:12 behalf 2:2,21 3:2,7,19 4:2,7 4:16 5:2,10,16 5:21 6:2,14 7:2 7:7,17 8:2 10:3 23:5 55:3 58:13,16,21,23 believe 11:23 benefit 45:8 bernstein 3:8 3:12	better 64:2 72:6,7 beyond 15:23 bind 67:12 bingaman 18:21 19:3,4 52:2 bit 9:15 29:3 35:10 48:14 72:17 blocking 35:21 35:23 37:19,19 39:18 40:23 60:18 69:5 bloomfield 7:12 board 13:4 24:23,24 26:14 26:23 28:13 33:9 34:8,9 44:19,21 50:10 50:12,19,24 51:7,11,14,19 boards 50:18 bockius 2:22 boiling 66:21 bottom 10:25 25:15 45:9 48:5 boulevard 6:7 bpo 4:10 bradley 18:21 19:3,4 52:1 breach 34:24	break 16:11 brewster 3:3 brian 4:7 brief 34:7 37:14 59:8 65:1 67:1 69:20 70:19,23 briefing 9:11 64:10 65:11 67:13 68:16 70:4,9,14 briefings 9:10 briefly 59:5 briefs 64:13 67:5 72:10,11 73:19,24 74:13 bringing 57:23 broad 3:22 31:21 42:5 50:18 broader 12:16 12:20 13:4 broadway 2:5 broke 25:2 brouse 4:17 brouse.com 4:19 build 41:3 69:11 burden 13:1 burton 4:11 business 10:11 13:18,23 14:10 14:14,17 27:14 34:5 73:19	c c 4:16 6:14 9:1 60:9,12,14,15 60:17,19,23 cabraser 3:8,12 california 2:6 3:13 call 73:11 callahan 6:18 called 43:3 calling 67:18 candid 52:17 52:21 candor 18:18 53:4 capital 14:16 14:22 34:4,5 caption 75:12 care 71:17,19 cared 14:20 carefully 71:21 carole 5:2 48:14 49:10 58:20 carry 48:13 case 9:20 12:17 15:24 17:25 18:17 24:11 30:6 31:24 32:5 35:16 40:25 43:19 44:24 45:7,14 46:7,14,21 48:17 49:15,19 50:1,2 52:20
---	---	---	--

[case - company]

Page 5

52:20 61:11 62:22,23,25 63:2 66:14 68:4 71:7,8 cases 14:10 24:13,16 25:10 31:15 32:4 44:2,25 49:14 63:8 69:11 categories 51:21 caused 30:10 caution 37:10 center 4:13 ceo 21:25 54:13 55:9 certainly 14:24 15:2 23:19 25:10 45:16 46:13 66:19 67:4 68:11 certificate 75:1 certify 75:8,11 75:13 chack 2:21 3:2 54:19 chack's 54:6,15 54:22 55:15 56:4 change 25:12 28:19 33:12,14 changes 34:15 charles 5:2 chicago 7:4	chose 16:13 chosen 66:9 christopher 6:4 chronology 33:20 chuck 20:14 48:11,13,18,20 53:13,14,15,19 53:21,23 cincinnati 4:9 circuit 25:22 49:25 50:8 63:1,3,5 circuits 63:6 circumstances 14:9 46:17 cite 24:12,17 44:2 cited 24:11 63:1 civil 1:4 13:25 26:10 28:15 33:8 40:15 claim 44:14 61:18 claims 40:15,15 40:16 41:3 clarify 22:3 clarity 73:9 class 2:2 51:13 classic 18:15 44:11 66:4,17 66:17 69:18,18 clear 20:2 38:4 38:8 39:7	43:17 54:17 62:25 64:19 71:10 73:12,13 clearing 72:4 clearly 45:10 cleveland 5:6 6:12 7:20 75:16 client 12:12 28:24 40:7,8 45:11 60:7 65:17,24 69:14 69:15,17 clients 38:24 60:6 close 44:24 73:19 code 20:14 48:19 codes 49:6 colloquy 59:17 59:25 columbia 4:13 columbus 2:19 3:17 5:23 6:8 7:14 come 36:8 44:8 48:10 51:22 66:8 comes 22:19 43:8 comfort 11:16 coming 40:14 40:19	comment 64:8 commission 75:25 commissioned 75:8 committed 15:6 common 13:9 24:23 commonly 41:16 communicated 57:17,20 communication 37:13 38:9,11 39:5 55:14 56:3 59:21 60:24 61:2 65:16 communicati... 16:6 24:5 32:1 37:20,21 38:20 38:23 39:10 41:9 43:24 46:2,23 60:20 65:23 companies 24:20 25:13,13 30:7 company 8:3 22:5,5 24:25 25:5 27:9 29:17 30:14,22 32:14 34:4,14 35:4,18 40:5 52:8,11
---	---	--	--

compel 9:24 74:16	conclusions 11:19 18:13	confronted 12:21	62:14
complaint 30:21	19:8 28:17,18	consideration 64:23	copying 73:10
complete 11:10 11:22	42:14 43:16,21	considered 71:13	corp 1:4 3:19 4:2 9:19
completed 11:6 75:12	48:22 51:24	consistently 69:4	corporate 13:22
completely 46:17	52:3,24 53:1	constructive 67:3,9	correct 17:7 22:9 48:15 54:15 57:2 69:2 75:9
complicate 46:14	concurred 70:9	consulting 32:8	corrected 21:14 52:1
complicated 38:3 46:5	concurrent 72:10	contact 73:9	couch 71:21 74:8
complicating 17:24	concurrently 72:24	containing 57:12	counsel 1:10 8:8 11:8 13:15 16:6,25 17:3,5 17:11,14,16,20 22:24 23:12 24:7 37:16 54:14,16,18 55:1,6 56:24 58:10 66:25,25 71:23 72:2 75:13
complicit 52:9	conduct 11:20 14:5 20:15 25:14 33:17 48:19 49:7 50:13,15 56:9 56:15,21	content 39:4	count 42:24
conceding 49:10	conducted 13:2 24:6,16 25:6 51:10	contention 50:9	country 63:4
concept 31:12	conference 1:10 74:22	context 10:24 13:16 40:6,14 61:3,22	counts 61:3
concepts 29:23	conferred 16:12	continued 3:1 4:1 5:1 6:1 7:1 8:1 28:6	county 75:5
concern 15:25	confidential 34:23 35:1	continues 35:18	couple 18:20 29:6
concerned 13:21 14:15	confidentiality 9:4 15:18,20 15:22	contours 65:3	course 23:25 27:5 33:8,9 37:23 40:24 47:10 59:25
concerning 10:5 18:7	confidentially 34:21 63:15	contrary 18:8	
concluded 49:1 74:22	confirm 10:16 21:1	conversation 20:4 39:4	
concluding 51:11	confirmed 17:1 17:2,7 21:25	conveyed 55:6 55:17	
conclusion 43:17 48:10 49:6,9,12 51:8 51:15,16,22 52:11 53:24		convince 15:1	
		cooperate 33:19,22	
		cooperative 33:20 41:6	

[course - difficult]

Page 7

63:13 court 1:1 43:22 53:8 courts 49:25 covered 25:19 45:11,11 covid 73:25 created 31:17 32:9 creating 20:17 credit 20:8 34:15 crendon 5:7 criminal 13:25 26:9 28:15 30:25 33:8 40:16 criticism 64:3 cromwell 3:21 cross 16:5 56:12 crr 1:20 75:24 crystalize 70:5 crystalizing 69:22 culture 13:22 currently 9:18 cuyahoga 75:5 cv 1:4 9:20	dave 22:1 david 3:19 5:10 7:12 23:3,15 65:25 davis 7:8 davispolk.com 7:11 day 6:6,10 13:5 14:1 25:6 27:4 29:20 74:8 75:16 dayco 44:3 days 13:14 28:22 73:17 dbloomfield 7:15 dead 74:1 deadline 70:10 deal 14:13 27:4 36:21,22 74:17 dealing 13:19 30:14 decades 53:8 december 34:14 decision 33:2 73:23 decisions 33:4 33:10,17,25 37:2 41:23 55:10,11 decisive 44:19 44:21 50:11,13 51:5	declaration 28:9 deeming 19:24 defend 51:17 defendant 2:21 3:2,19 4:2,7,16 5:2,10,16,21 6:14 7:2,17 8:2 21:14 23:5 52:19 defendants 6:2 7:7 16:4 20:8 22:22 defending 40:15,15,16 50:24,25 51:1 defense 44:13 44:20,22 50:23 defenses 41:4 deferred 15:8 17:15 degree 72:19 delayed 10:12 deloitte 62:25 demetriou 6:3 demonstrates 12:2 dennis 2:21 3:2 54:6 department 35:8,11,13,17 depending 52:15 depo 21:7 39:20 64:5	67:15,17 deponent 66:24 depose 65:18 65:19 66:13 69:14,16 70:25 deposing 67:16 deposition 16:3 21:18 36:15,19 37:8 47:9 54:5 54:11 61:20,23 62:4 depositions 18:7 36:7 46:12 described 18:22 25:10 41:12 describing 24:22 59:18 designation 9:5 details 41:19 determine 14:6 19:11 develop 28:18 33:11 developed 66:1 66:14 71:3 dhutton 2:16 diego 2:6 different 13:16 27:3 28:12 32:3,22,23,25 44:1 52:15 difficult 73:16
d			
d 4:2 5:11 6:4 9:1 d.c. 4:13 6:16 daniel 5:3			

dig 34:6 direct 3:7 23:9 58:24 directed 10:10 direction 36:20 directors 25:4 26:6 disagree 64:20 disclosable 59:13 disclose 15:23 17:18 19:12,13 20:21 47:24 49:8,11 52:16 56:25 60:16 disclosed 18:4 47:22 53:18,25 58:2 67:23 68:11 discloses 18:13 disclosing 17:13 18:16 19:14 47:18 disclosure 11:21 12:10 44:7,11 50:5 disclosures 15:5,24 19:7 49:17,18,19 discoverable 63:24 discovered 68:6 discovery 17:25 46:12,15	61:4 discuss 9:11 17:12 19:19 36:23 48:2 65:22 68:20,22 73:10 discussed 38:11 59:13 65:2 discussing 39:1 discussion 40:3 40:10,11,12 60:11,13 74:21 discussions 30:8 36:13 40:14 dispute 50:7,7 disputes 46:9 distinction 24:10 district 1:1,1 49:24 50:3,3 division 1:2 dmansfield 3:5 document 1:6 31:17,20 35:15 43:1 documents 10:16 11:23,24 12:1,6 24:4,13 29:4 31:22,25 35:16,19 36:3 36:6 39:13 42:22 60:21 69:5,6	doing 17:21 18:1 19:24 32:8 35:20 36:8 38:21 45:4 48:15 52:10 68:3 69:4 doj 26:1,20,23 donald 4:7 5:21 6:3 door 64:25 douglas 3:2 5:4 dowd 2:4,10,14 dowling 7:17 22:22 23:6 37:15 58:14 dozens 36:7,8 dpa 20:19 47:19 draw 19:10 drawing 19:11 drawn 18:14 drive 54:3 dshively 5:8 dual 14:25 dublin 2:18 due 73:24 duffy 6:6 duly 75:7 duration 10:22 dwarren 5:7 e e 5:2,10 6:5,18 9:1,1	earlier 53:13 56:6 early 19:14 east 5:22 eastern 1:2 50:3 easy 71:15 ebony 52:18 edt 1:14 effect 34:13 effectively 17:21 19:24 efforts 17:24 egler 2:9 egregious 57:24 either 13:2,6,19 22:13 42:12 68:12,18,19 75:13 ejtaft 5:24 elements 15:17 elicited 16:20 17:3 ellis 7:18 email 19:1,2,3 43:9 52:4 emerson 27:21 emery 7:3 emily 5:21 employee 18:22 56:9,15,21 employees 20:20 33:18
---	--	---	---

[employment - favret]

Page 9

employment 33:2,3,10,16,25 41:23 61:9	68:4 establish 12:25 13:1 14:18,23	explains 26:8 26:21 33:3	37:19,24 38:4 38:10,17 39:8
encourage 23:17	established 17:14	exploiting 20:9	39:11,12,13,14
endeavor 12:3	establishing 44:13	extensive 11:14 15:25 19:7 51:10	39:14,17,19,20 40:8,21 47:5,7 47:9,13,18,23
endorsing 55:9	ethical 34:24	extent 12:10 29:25 43:15 49:16 56:23 64:16	48:1,7,9 49:4,5 54:4,18,21 55:4,7,12,15,17 56:4 57:12,17 57:20 58:1 60:8,22 61:19 65:15,17,19,24 65:24 66:13 67:22,22,24 68:1,4,6,8,11 68:13,14,20,21 68:22,23,25 69:3,5,6,8,9,10 69:13,15,17 70:16 71:23 72:1
energy 74:15	event 75:14	extraordinary 37:7 45:14	factual 39:4
enters 39:4	everybody 73:25	extreme 14:8 45:16	failed 13:7 14:18
entire 17:15 32:23 42:3 49:18	evidence 43:20 65:3	f	fair 26:12
entirely 41:6	exact 47:25 48:1 51:1	f 2:17 6:4,18	fairly 70:3 73:12
entitled 18:5 68:25 69:2	exactly 25:3 43:10 47:17 48:2 64:16	face 24:20 28:15 60:8 65:14	fairweather 4:16
equivalent 51:2	examination 16:5	faced 27:9 31:8	fall 44:3
erase 20:12	example 32:6 42:17 43:19 48:10 72:22	facilitated 52:8	falls 66:16
eric 7:8	examples 18:20	fact 12:1 15:14 22:4 25:1,25 28:6 30:3,5,16 31:16 33:16 35:18 37:15 38:22 40:11 41:1 49:11 55:22 59:13 60:11,15 61:1 61:4 63:24,24 65:2	far 56:14
erika 8:8	exception 11:23	facts 17:15 19:24,25 20:24 21:2 35:25	favret 7:17
especially 30:6	exchange 54:25		
esq 2:2,3,3,4,9 2:13,17,21,22 3:2,7,11,15,19 3:20,20,21 4:2 4:7,11,16 5:2,3 5:3,4,10,11,16 5:21 6:6,10,14 6:18,18 7:2,7,8 7:12,12,17,18 8:2	exclusively 51:24 60:25 66:25		
essence 10:8	expedited 73:7		
essential 10:17	expiration 75:25		
essentially 20:23 34:8	explained 28:4		

[fdi - goal]

Page 10

fdi 32:8 federal 13:20 feels 62:12 feet 64:6 figure 33:22 files 24:1 59:22 62:19 filings 14:12 finally 44:5 financial 10:12 32:10,15 financials 32:21 find 36:4 71:6,9 finding 61:12 fine 32:10 37:23 57:21 72:25 firing 54:6,15 54:22 55:16,23 56:4 firm 25:4 32:8 46:7 first 10:4 11:4 12:9 15:5 23:17 26:17 29:8 36:17 50:1 52:25 61:24 64:3,14 firstenergy 1:4 3:19 4:2 8:2,3 9:19 10:5,12 11:7 12:5,5,22 12:25 13:18 16:11,20 17:9	17:17 18:13,21 18:23 19:5,11 22:19 29:4 48:18,19 51:23 54:7,14 55:5 55:11 56:8 57:7,11 62:1 66:10 firstenergy's 17:3 20:14,19 48:21 57:2 62:8,11 firstenergy.c... 8:5 five 64:13 67:18 74:12 floor 3:9,13 5:12 7:9 fly 37:2 focus 24:7 focused 46:21 forbid 74:5 foregoing 75:9 75:12 foremost 11:4 forge 2:2 9:2,13 10:2,3 12:19 21:9,13,19,24 22:7,17 23:6 24:22 25:24 26:13 27:2 28:20 29:10 30:19 31:13 35:24 36:11 41:11 42:17	47:2,3 58:4,5 59:2,4,10,18 61:6 62:21 65:6,9,13,22 67:11,20 70:13 70:20 71:1 72:25 73:20 forgotten 74:6 form 27:2 31:14,17,19,23 former 25:5 fornshell 3:15 forth 38:14 forward 11:12 67:10 found 44:10 foundation 68:1 four 41:22 francisco 3:13 frankly 13:10 freely 19:14 front 13:14,17 21:7 31:3 70:5 70:14 fronts 19:20 fully 45:17 73:21 further 75:11 75:12	gay 5:22 geller 2:4,10,14 generally 37:9 generated 68:22 geoffrey 6:10 george 6:2 48:12 53:14,15 53:16,17 georgia 2:11 getting 10:18 11:16 27:9 28:7,10 37:8 39:23 60:18 73:25 giant 62:18 gibson 3:3 giuffra 3:20 giuffrar 3:24 give 18:19 42:16 43:23 62:1,8,14 68:10,12,13,19 68:21 72:12 given 13:25 18:11 75:8,10 giving 38:15 gjritts 6:13 glad 67:2 go 39:12 59:2,4 59:6,6 64:6 67:17 69:12,15 74:19 goal 73:22
		g	
		g 9:1 game 62:13 gather 48:7	

god 64:7 74:5 goes 28:11 going 9:5,22 11:11 16:10 21:20 23:23 29:22 30:18,25 31:7 32:17 33:11 46:11,15 47:6 48:12,13 53:8 59:4 64:24 65:13 66:13 71:6 73:2,3,15,24 74:11 good 48:15 gotcha 62:12 government 11:13 15:5,6,7 15:11,14,24 17:23 31:6 grand 26:1 granted 45:16 great 21:22 grounds 45:20 guran 5:16 gut 67:14 guys 67:18	hands 28:13 happen 27:5,6 30:5 37:1 46:4 happened 11:1 24:12,21 25:1 25:11 26:24 31:4,5 32:14 33:25 36:1,4 38:18 39:14 41:2 46:10,19 60:21,22 66:7 happening 57:25 happens 41:16 happy 12:15 22:17 46:24 58:8 63:19 66:19 67:1,4 68:15 69:20 70:1 harbor 74:15 hard 41:18 hash 73:11 hayden 43:3,5 43:10 52:1,5 hear 65:7 heard 25:23 26:12 52:12 64:18 hearing 21:21 73:6 heart 47:5 48:3 heavily 32:7 heimann 3:8,11 3:12	held 1:10 helms 7:2 help 64:7 helpful 23:21 69:22 72:20 74:10 hereunto 75:15 herrington 4:12 hickman 53:9 hide 49:12 hiding 38:18 high 7:13 highly 20:24 49:15 hilary 2:3 hire 24:23 hired 25:4,5 hog 22:24 hold 14:10 47:15 holding 36:1,6 home 54:3 honor 21:9 23:10 hope 74:3 hoped 72:4 horizon 50:1 horribly 20:17 hostetler 5:4 hours 69:8 house 8:8 householder 10:14 13:13 30:21	hr 14:8,8,9 16:7 hstakem 2:8 hudson 3:8 huge 13:10 hughes 4:8 human 55:10 humans 39:3 hutton 2:13 hydraulics 43:19
h			i
h 6:7 hand 46:1 59:20 75:15 handcuffed 20:20 handful 11:24			ice 3:16 icemiller.com 3:18 identified 50:1 identify 9:25 19:10 ignored 28:2 iii 6:4 7:17 illinois 7:4 illuminating 74:11 imagine 67:15 immediately 50:14 immunity 13:25 27:4 immunize 61:3 impact 30:22 importance 74:7 important 21:1 45:22 61:15,22 impossible 19:9 39:2

impression 18:24 49:4 51:16 52:16,22 53:3,3,5,6 64:14	29:18,21 30:3 34:20 35:1,13 46:19 47:21 50:20 51:3,4,8 51:22 58:11 62:1,8,14 63:9 63:11 66:1,24	interrupt 23:18 interviews 11:17,18 investigated 30:23 investigation 10:6,10,22,23 10:23 11:5,10 11:14 12:10,20 13:3,4,6 14:6 14:24 15:1,13 16:7,15,21 22:6 25:25 26:6,7,14,24 27:1,8 28:4,5 28:14,21,24 30:13 31:14,19 32:24 33:6,12 33:18,19,21,23 34:2,10,12,13 34:17 42:3,15 43:18 44:10 45:5 51:10 61:12 66:2	involve 56:15 involved 16:16 16:17,21 37:25 46:7 56:9,21 57:10 61:15 71:25 72:2 73:7 involvement 40:22 66:10 involving 13:5 30:6 israel 5:3 issue 9:5,16 10:8 15:16 17:22 18:9 27:12 32:15,22 33:2 37:25 45:22 47:5 48:5 49:25 57:16 59:12,16 63:23 64:10,13 65:2,2 69:21 69:22 70:6,14 70:23 72:11,17 73:15
impressions 18:15,17,18 19:8 37:22	informed 50:14 54:13	initial 10:9 13:2 26:13 28:3	issues 11:6 16:7 16:16,17,22 30:15 36:25 39:24 56:9,16 56:20 57:6,10 61:14 63:7 70:6 71:3,7,17 71:19 73:2,9 73:12,14,14 74:15,18
improper 19:20 36:19	inquire 39:20	instruct 18:5 54:23	
improperly 17:10 18:1	instructing 17:10,17 55:2		
inclination 71:20,22	instruction 20:21 37:8 59:17,19 66:23	investigations 14:3 24:6,15 25:7,15,18 37:6 45:10 46:6	
including 15:12 19:15 46:6	instructions 37:9	investigators 12:4	
incorrect 59:19	insufficiently 33:20	investor 14:21	
independent 25:4	interaction 54:17,17	investors 14:14	
indictment 39:15	interested 71:8 75:14	invite 58:6	
individual 42:18 52:7,25 53:1	internal 10:5 10:10 12:20 14:5 24:5 26:25 30:13 37:6 44:9 45:5 54:14,18 57:5		
individuals 23:2 51:23 52:20 61:15			
information 11:11,12 15:7 15:11,12,23 16:20,23 17:5 17:11,13,19 18:3,12 19:16 19:18 20:5,6 20:13,18,22			

[issuing - know]

Page 13

issuing 10:18	jones's 13:15	justify 49:14	30:18,19,20,21
j	48:14	k	31:2,6,9 32:2,6
j 3:7,20 5:21	jonesday.com	k 2:21 6:5	33:9 34:10,17
6:2,2,3,10	6:9,13	karen 2:22	34:19,20,24,25
james 5:10 6:4	joseph 2:17	karen.pohlma...	35:10,19 37:7
jason 2:2 6:2	joshua 7:7	2:25	37:10,13,22
10:2 66:13	joshua.shinbrot	katsiff 5:11	38:10,12,19,21
69:16,16	7:11	katsifft 5:14	38:24,25 39:3
jason's 69:14	jr 3:20 7:12	keen 69:24	39:5,9,12,16,24
jerry 6:4	judge 1:10 5:16	keenly 13:20,21	40:2,2,4,7,9,10
jfairweather	9:7,14,21	keep 34:22,25	40:16,19,22,24
4:19	12:18 21:6,12	55:8	41:2,5,6,8,13
jforge 2:7	21:17,22 22:1	kevin 2:3	41:15,15 42:3
jim 22:2	22:10 23:1,8	key 31:12	42:5,7,10,11,13
job 1:23 48:16	23:11,14 27:20	kichline 2:21	42:14,16,16,18
john 4:16 5:16	29:3 35:7	kim 7:8	42:19,22,24
6:5,7 7:17,18	37:21 38:7	kind 43:18 44:6	43:1,2,4,5,9,16
23:5	39:19 47:1,3	45:7,24 53:9	43:20 44:1,9
john.favret	58:4,10,15,18	kinds 25:14	44:16,17,18,19
7:21	59:1,6 61:24	30:14 31:8	44:20,22 45:9
john.mccaffrey	63:21 65:6,8	44:3	45:21,21,24
7:21	65:12,25 67:11	king 50:2	46:4,6,8,13
johnson 6:3,14	70:7,18,22	knew 18:19	48:15 49:3,9
join 22:21 70:6	71:2 72:24	40:21 43:6	50:14 51:2
72:17	73:1,5,21	48:11 52:10	52:25 53:7,8
joint 74:18	julia 6:3	53:4,15,20	53:12,13,21
jolson 27:21	july 14:1 51:3	56:14	57:5 59:11,12
jones 5:2 6:6,10	75:25	knock 74:12	59:13,24 60:1
13:5 20:14	jump 73:11	know 9:6 18:19	60:5,6,7,10,14
22:22 23:13	june 25:2	23:21,24,24	60:15,15,19,20
25:6 29:20	jury 26:1	25:8,17,19	61:5,9,11,14,14
48:11,19,20	justice 35:8,11	26:1,10,15,16	61:16,19,20,25
49:10 53:13,15	35:14,17	26:17 27:13	62:6,12,13,15
53:19,21,23	justification	28:11,14,20	62:18,21,24
58:16,21	48:11	29:23 30:1,17	63:3,6,13,15,16

[know - llp]

Page 14

63:19 64:4,5 64:11,24 66:4 66:5,11,15,20 66:22,23,25 67:1,2,3,7,9,9 68:9,15 69:24 69:25 70:1,3,4 70:5,13 71:7 71:14,16,18,20 72:3,13,14,22 73:1 74:12,13 knowing 18:22 knowledge 18:12 40:1 42:18 55:7 62:2,9,11,15 63:25 knows 66:14 koslen 8:2 koslenm 8:5 kristin 1:20 58:21 75:7,24 ksciarani 2:7	law 25:4 29:8 29:15 31:24 43:17 46:7 49:21 62:22,23 63:17 71:7,8 law.com 3:5 lawyer 20:1,4 20:12 23:25 36:13 37:12,13 37:18,23,24 38:10,14,19 39:10 40:4 43:24,25 48:25 49:4 53:25 56:8 57:2,7,11 57:18,21 59:14 59:21 60:11,13 60:24 65:16 66:2,5,6,6 69:13 70:17 lawyer's 41:1 lawyerly 64:15 lawyers 18:14 18:15 19:9,16 20:22 21:2 24:16,23,25 37:20 45:25 46:1,2,2 47:14 47:18,24 48:6 48:22 51:9,9 51:24 52:3 55:24 58:2 59:22 60:5 62:19 65:18,19 66:12 67:16	69:11 laying 68:1 lchb.com 3:10 3:14 lead 46:9,11 leading 39:15 learn 39:12 72:1 learned 20:4,11 37:12,18,22,24 39:21,22 47:14 51:4 57:11 61:1 66:24 69:16 learning 69:9 learns 33:9 led 25:5 left 68:8 legal 12:24 15:2 16:8,9,16 16:17,21 39:24 46:22 48:8,8 49:5 51:16 55:14,16,20 56:2,9,15,20 57:6,10 leila 6:14 lengthy 24:5 25:6 37:6 leslie 6:5 level 69:12 leverage 61:21 lewis 2:22 lexington 7:9	liabilities 30:6 30:7 liability 26:9 28:16 33:8 51:18 60:8 lieff 3:8,12 life 74:2 likely 46:8 67:8 73:8 limits 58:3 line 15:8 19:10 19:10 34:8 45:9 48:5 lines 37:10 43:5 44:4 53:12 lisowski 6:2 listed 13:4 literally 27:25 43:8 47:8 litigation 1:4 9:20 11:1 13:7 14:19 25:21,23 26:2,3,10,21 31:7,9,18,20 33:13 45:7 46:3 49:20 little 9:15 29:3 48:14 72:2,5 llc 3:3 llp 2:4,10,14,18 2:22 3:8,12,16 3:21 4:3,12 5:4 5:11,17,22 7:3 7:8,13,18
l			
l 3:15,21 5:3,4 5:10 6:3,14 lack 12:11,12 73:8 laid 10:7 lake 7:3 lakeside 6:11 lane 3:3 lape 3:3 larry 10:14 13:13			

[lmng - murkier]

Page 15

lmng 3:5 local 13:19 long 21:21 70:12 look 20:7 24:1 27:5 28:23 32:3 43:2 48:16 67:16 looking 73:7 lot 24:7 29:10 64:2,25 71:6 luis 6:4	making 17:23 37:1 41:6 50:17,17 54:3 55:10 mansfield 3:2,3 marjorie 6:6 mark 43:3 52:1 52:5 market 2:23 5:12 massachusetts 6:15 master 9:21 12:17 21:10 54:2 material 30:7 34:15 materials 35:10 matter 9:19 11:6 44:13 46:17 67:21,23 67:25 matters 40:25 41:1 matthew 3:15 matthew.forn... 3:18 mccaffrey 7:18 23:4,5 58:13 mcconnell 6:7 mcdermott 7:3 mcdowell 4:17 mean 37:4 38:12 60:12 66:16,19 68:9	70:2 71:2 means 21:4 65:12 media 26:1 melville 2:15 members 50:19 50:24 memory 20:12 mental 18:15 18:17,18,24 19:8 37:21 49:3 51:16 52:16,21 53:2 53:5,6 mentioned 34:3 53:13 56:6 miarmi 3:7 23:9 58:23,25 59:1 mic 22:24 michael 2:21 3:7 6:2 7:17 8:2 23:5 58:24 michael.kichl... 2:24 miller 3:16 million 36:3 mind 20:11 23:20 42:20,23 42:25 55:8 miner 6:18 minutes 67:19 misheff 6:3 misleading 20:17,24	missed 58:7 mistaken 22:7 mittell 6:4 mixing 29:23 mmiarmi 3:10 mmmb.com 2:20 moment 27:16 56:17 64:8 monday 73:23 74:4 money 48:12 months 13:15 28:6 morgan 2:22 morganlewis.... 2:24,25 morris 7:13 motion 10:4,5 22:23 24:9 31:21 58:7 60:1 66:21 74:16 motions 9:23 moul 2:18 movants 24:3 28:3 37:15 41:22 move 12:15,19 67:10 mpduffy 6:9 multiple 10:15 11:3 52:18 murkier 72:4
m			
m 2:21 3:2,2 6:2,5 7:8 m.g. 7:2 m.j. 3:19 made 22:4 33:4 33:17 35:24 49:19 55:11 59:10 62:6 64:8 magistrate 27:20 main 4:17 5:17 7:19 8:3 maintain 15:19 15:21 make 9:2 22:8 22:16 23:19 33:23 34:15 52:14 59:15 65:10 makes 33:10			

[murky - own]

Page 16

murky 72:2 murphy 2:18 murray 2:17,18 2:20 mute 65:8 mwe.com 7:5	nice 67:14 niche 24:8 night 72:19 73:3 nonlawyer 32:8 nonlegal 48:6 nonparties 74:16 nonprivileged 43:9 nonsense 64:25 north 6:11 notary 75:7,24 notes 73:6 notice 30:11 notion 13:24 14:1 48:24 49:8 noun 38:15 novel 71:24 number 9:20 10:8 19:23 44:2 50:17 59:16 71:17 nw 4:12 6:15	objects 54:16 obligated 32:15 32:21 obtain 14:15 16:22 58:1 obtained 16:24 17:5,11,19 obviously 16:12 25:12 36:16 46:4 63:10 67:5 occurred 16:2 21:15 offer 15:15,22 office 75:15 officers 50:19 50:25 51:14,20 oh 47:12 48:25 61:10 ohio 1:1 2:19 3:4,17 4:4,9,18 5:6,18,23 6:8 6:12 7:14,20 8:4 75:3,7,16 75:24 okay 9:13 12:19 20:10 22:15 27:20 37:18 38:7 47:12 57:1 59:8 70:20 71:1 74:20 once 12:21 13:8 19:16 53:24	ongoing 12:20 onslaught 26:9 26:21 openly 18:16 opens 64:25 opportunity 64:9 opposite 15:21 47:8 50:5 opposition 29:14 opt 22:23 oral 9:22 order 26:16 40:6 73:8 ordered 62:2,7 original 72:3 orrick 4:12 orrick.com 4:14 ostrowski 8:8 outset 25:18 outside 10:19 11:7 14:16 26:5 34:4 overarching 71:21 overlap 71:15 overnight 72:14 oversaw 26:6 own 29:5 50:23
n	n 3:20 6:3 9:1 nakasian 3:3 named 54:13 ne 2:10 nearly 11:21,22 need 9:9 40:6 60:7 65:4,11 67:7 68:17 70:11 74:17 needed 14:6 34:4 needlessly 46:14,14 needs 61:24,25 neil 27:23 nelles 3:21 nelless 3:25 never 22:3 44:21 new 2:15 3:9,9 3:22,22 6:20 6:20 7:10,10 32:15 60:2 63:2 65:3 news 13:14,15 13:17 25:2 newton 56:13	o	
	o 9:1 o'connor 4:7 o'neil 6:4 27:7 27:23 28:5 29:19 o'neil's 26:18 33:2 objection 36:19 54:23 56:22		

[p - potential]

Page 17

p	pause 12:16	personal 18:12	pohlmann 2:22
p 4:7,16 5:16	paying 18:23	perspective	point 6:11
6:6 9:1	19:5	48:17	35:23 36:2,7
p.m. 74:22	payment 53:14	pharmaceutic...	39:25 41:22
page 13:14,17	53:16,17,20	50:2	42:4 43:3 44:5
54:9 72:10	payments 43:6	phase 26:13	47:17 49:11
pages 36:3 65:4	43:6 52:9	28:3	54:3 62:21
67:7 70:3,8,8	pburton 4:14	phases 28:12	68:17 71:22
71:5 73:17	peachtree 2:10	phelms 7:5	pointed 42:22
paper 22:21	pearson 5:10	philadelphia	44:16
60:1	16:4,15 21:7	2:23 5:13	points 13:16
papers 10:7	22:2,3	phoenix 63:2	22:15 29:6
17:9 36:16	pease 5:17,22	physically 46:5	49:21 51:12
pappas 6:4	pending 9:23	pianalto 6:4	59:9,15 61:13
paragraph	74:13	pick 68:18	policies 48:21
27:25 28:9	pennsylvania	pike 4:4	49:6
part 12:2,7,9	2:23 5:13	pile 64:12	polish 72:8
22:22 33:14	people 38:23	pinetree 4:3	politicians
39:9 56:3 58:6	51:21 66:8	place 22:6	13:20
67:14 70:18,22	68:6,7,12,13,18	75:12	polk 7:8
particular	68:19,21 69:2	plainly 25:19	porter 6:15,19
24:13	pepich 2:4	31:9 66:16	7:13
parties 41:3,18	pepper 4:4	plaintiff 9:25	porterwright....
41:21 45:24	perception	67:6	7:15,16
64:22 71:18	13:21,22 14:21	plaintiffs 2:2	portion 21:6
parts 24:8,8,9	14:21,22	3:7 10:3 23:10	position 38:6
party 15:22	period 9:8	36:23 41:22	52:14 64:19,20
16:3 46:1 66:6	50:20 51:13	46:10 58:24	64:21 71:11
75:13	permitted	72:23 73:20	72:5,7
party's 71:11	70:10	play 29:1	positions 18:8
pass 15:3 73:3	person 41:18	playing 17:22	possibility
passing 72:18	60:12	57:16 68:2	19:17
patton 11:8	person's 40:1	please 9:25	possibly 52:24
paul 6:2 7:2	42:23	12:18 21:12	potential 26:8
		22:13 59:4	28:16 29:11

[potential - pwc]

Page 18

<p>30:6,7 60:8 powell 3:4 practical 11:4 46:16 60:4 precisely 48:7 predominant 27:18 preexisting 40:1 prepare 11:1 prerequisites 10:17 present 8:7 9:6 9:9 23:21 presentation 34:8,9 presented 64:4 preston 4:11 pretty 73:14,15 74:13,13 pricewaterho... 10:19 primarily 10:11 12:24 13:3 primary 16:17 principal 10:24 principle 23:25 prior 50:20 54:12 privilege 12:8 12:12,13 15:10 15:16,17,20 19:17,21 25:19 27:17,22 29:17</p>	<p>29:24 34:3 35:9 36:25 45:11,18 49:12 49:13 66:17 69:19 privileged 12:7 18:3,5 19:23 19:25 21:3 24:17 25:20 29:18,21 30:12 32:12 35:13 36:12 37:24 38:1,5 40:10 40:12 41:8 42:8 45:2 47:7 47:9,10,11,21 60:23 61:2 63:11,14 65:15 65:16,20 66:15 67:25 privileges 21:4 problem 21:16 56:7 proceed 10:1 12:18 proceeding 9:21 30:25 75:11 proceedings 75:8,10 process 48:9 processing 49:5 produce 38:12 produced 24:14</p>	<p>product 11:15 12:12 18:16 24:15 25:20 29:9,11,12,24 29:25 30:12 34:3,21 40:13 40:18 41:9 42:9 45:12,19 49:13,22 50:6 62:23,24 63:7 63:17 66:2,3,4 66:16,17 69:18 production 24:4 37:5 promptly 69:25 72:15 proper 66:22 proponent 67:6 proposal 67:12 proposition 71:24 prosecution 15:8 17:16 protected 34:2 39:9,11 40:13 63:16 66:3 protecting 41:8 protection 49:13 protections 50:6 provide 15:7,11 21:10,16 26:4 29:17,21 35:12 35:16 41:7</p>	<p>provided 11:12 17:13,16 19:16 19:25 20:22 21:2 26:22 35:17,19 36:5 41:17,20,20 54:18 63:9 providing 34:20,20 43:13 46:18,19 public 5:5 13:11 14:20 63:10,11,13 75:7,24 publicity 13:12 publicly 48:18 48:20 purpose 10:11 10:25 11:15 12:11,24 14:14 14:17,25 27:14 27:18,24 33:7 34:5,11 43:7 48:7 purposes 10:1 14:8,9,11 15:2 27:19 33:5 44:12 48:6 put 20:10 37:13 53:17 60:3 70:5 72:8 pwc 10:20 11:2 11:8,9,15,16,21 11:25 12:1,2,6 12:11 26:16</p>
---	--	--	---

27:14,24 29:18 29:21,25 30:4	raise 34:4 36:24 70:23	reason 20:25 35:22 54:6,14 54:22 57:22	54:4
q	raised 41:13 59:25 62:21 64:10 65:4 74:18	reasonable 15:18,21 28:21 28:23,24	regardless 30:24
qualified 75:8 quarter 10:13 question 13:11 27:17 29:16 30:9 36:19,20 48:4 54:12,20 55:3,19 57:1,4 57:13,19 63:18 66:20,22 68:6 68:7 70:17 questioning 71:25 questions 12:17 16:13,14 18:6 22:18 23:18 46:25 54:5 56:13 59:3 63:20 70:16 72:20 73:4 quickly 69:24 72:11,22 74:13 quintessential 49:3 53:6 quite 24:19 32:3,7 33:23 35:10 quotes 10:24	raising 36:17 randazzo 18:23 19:5 52:9,10 rank 74:7 rapid 70:4 rapidly 69:23 rationale 43:23 reach 28:17 reached 53:25 68:17 reaching 49:5 reaction 67:11 67:14 read 54:4 reading 67:14 real 27:6 realistic 14:4 72:15 reality 12:21 28:23 really 15:15 19:9 20:8 21:1 28:2 31:5,10 31:24,25 32:2 33:4 34:7,16 38:16,22 39:3 39:25 44:23 45:14 61:14 68:16	recent 57:24 59:25 recently 16:2 recipient 63:25 record 9:18 10:1 20:17,25 22:3,9 42:13 54:8 74:19,20 74:21 redacted 38:13 reduced 75:8 refer 10:20 11:17 18:10 referred 61:8 referring 54:9 61:13 62:4 63:8 reffner 4:16 7:2 52:19 regarding 11:19 16:6 47:5 49:22	regret 64:24 regulator 14:21 regulators 13:20 35:20 40:17 rein 3:19 23:16 29:6 35:12 38:2,8 39:22 47:1,7,20 48:24 49:21 51:25 52:13,23 59:3,8 63:23 65:21 66:1 69:1 72:16 rein's 65:14 72:3 reind 3:23 related 15:2 16:7 57:6 relates 1:6 relative 75:13 relatively 67:5 releasing 10:12 relevant 57:12 relief 59:23 rely 20:21 32:4 32:7 remained 13:14 remains 13:10 13:16 40:12,12 remedy 36:18 37:7 59:18,20
r			
r 4:7 5:3,21 9:1 rachael 5:3			

[remember - saying]

Page 20

remember 31:12 41:19 56:17 57:12 remote 1:10 2:1 3:1 4:1 5:1 6:1 7:1 8:1 remotely 75:11 render 34:1,2 40:9 48:8 rendon 5:2 23:12 58:16,20 58:21 reopening 46:11 repeatedly 17:13 repeating 53:22 reply 22:21 report 74:18 reporter 1:20 58:19,22 65:7 74:20 reporting 32:10 reports 26:1 represent 22:2 representation 50:18,23 representations 50:16 represented 11:8 request 9:10	requested 45:13 requests 35:15 46:13 requires 37:5 research 73:16 resign 35:3,5 resolve 69:24 resolved 34:13 resource 55:10 respect 66:23 respectively 50:4 respond 59:5 72:23 responding 33:7 40:17 response 24:23 55:5 59:11 64:15 70:10 responsive 23:20 70:17 restate 32:21 restatement 32:9,11,13,20 results 10:13 11:15 28:11 retained 13:3 14:7 26:16,19 26:19 revealed 11:14 48:23 52:2 61:20 revealing 42:9 43:12	revelation 39:16 review 56:9,15 56:21 57:6,9 reviewing 73:5 revolves 13:18 reyes 6:4 rgrdlaw.com 2:7,7,8,8,12,16 rheimann 3:14 richard 3:11 right 17:6 22:14 23:23 24:12 25:3 27:16,18 29:10 29:12,14 31:3 31:18 32:9 33:13 36:5,9 36:20 38:5,17 39:14,15,16,24 40:3,15,25 42:3,21 44:7 44:10,25 45:1 51:7 55:24 57:3 61:8 63:11 66:3,7 69:2,10,17 rightly 69:25 risk 31:7,9 risrael 5:8 ritts 6:10 rmr 1:20 75:24 road 2:10,14,18 4:3	robbins 2:4,10 2:14 robert 3:20 4:16 7:2,12 52:19 rough 54:10 56:12 round 61:24 rounds 61:23 roxworthy 25:22 rtrafford 7:16 rudman 2:4,10 2:14 rushed 27:13
			s
			s 2:3 7:12 9:1 sake 35:9 sam 18:23 19:5 52:9,10 san 2:6 3:13 sandra 6:4 santen 4:8 santenhughes... 4:10 sater 5:17,22 satisfy 27:14 saying 32:23 37:25 38:21 39:8 44:17 51:2,20 52:24 60:22,23 61:4 62:6 63:11,12 63:15 64:17,19 66:12 67:24

[saying - sort]

Page 21

68:5,24 69:12 says 19:3 20:16 26:23 27:25 28:5,8 29:19 34:12 42:20,23 48:18,20 54:16 55:25 56:10 scandal 13:11 schedule 70:4 schneider 4:7 5:21 schroeder 44:3 sciarani 2:3 scope 10:21 12:16 script 52:4 53:18 scripts 18:11 18:13 19:15 47:19 seal 75:15 sec 14:12 second 10:13 47:15 secondarily 61:5 secondary 9:16 71:9 secret 43:12 secure 14:16 securities 1:4 9:19 see 9:8,9,9 25:10 68:14	seeing 30:15 seeking 16:8,9 55:14,16,20 56:2 seeks 24:9 seemed 64:15 seems 71:14 seen 17:8 selective 16:1 44:6,11,14,24 44:25 50:9 sense 13:9 33:24 52:14 sensing 16:10 56:7,7 separated 52:7 september 1:14 9:17 54:10 75:16 series 71:16 serious 24:20 service 2:14 8:3 set 75:15 settled 29:8,16 31:1 49:21 seven 11:23 seymour 5:17 5:22 shape 27:8 share 21:20 49:22 shared 29:9,25 30:3 68:8 sharing 62:23 63:15	sharon 3:21 shawn 1:10 9:21 shield 45:1 51:6 shinbrot 7:7 ships 72:18 shively 5:4 short 67:5 show 42:22 shut 14:2 57:18 sic 69:6 side 24:2 60:17 65:1 70:3,9 sides 17:22 57:16 63:22 68:2 73:1,10 sign 10:18 signature 75:21 significant 30:15,22 silencing 17:25 simple 65:1 70:15 73:14,15 simply 13:7 14:18 20:5 43:13 50:11 68:1 74:7 simultaneously 15:10 single 30:16 sir 17:6 57:15 65:8 sit 28:13,25	situation 44:8 45:25 situations 25:9 63:9 sixth 25:22 49:25 50:7 63:1,3 skipping 56:11 slid 74:6 small 24:8 smaller 24:9 smart 6:2 sole 55:7 solicited 57:3 solid 63:17 solution 66:18 somebody 53:4 68:10 71:22 somebody's 53:4 somewhat 61:13 soon 22:13 51:4 65:5 70:11,11 72:15 sorry 41:10 58:20,21 65:9 sort 24:7 27:4 27:13 29:23 30:11,25 31:10 32:22 34:6,7 34:18 35:23 37:4,5,7 38:12 38:13,14 39:7 42:1,4,14
---	--	---	---

[sort - taft]

Page 22

44:22,24 59:12 60:3,10 61:7 61:17 62:20 66:21 71:3 sorts 9:16 sought 59:23 sounds 69:21 source 48:1 55:7 sources 71:9 south 2:14 4:17 5:17 7:13 8:3 southern 1:1 spahr 5:11 speak 9:3 12:11 60:5 speaking 52:13 speaks 22:19 special 1:10 9:21 12:17 21:10 54:2 specific 31:22 31:25 32:1 42:4 49:20 61:25 specifically 10:11 27:23 specifics 56:24 specified 75:12 speculating 26:11 speculative 31:2 spent 69:8	spoken 62:10 spring 74:2 square 5:5 49:14 squire 11:8 25:4 26:6,13 26:19,22 28:8 29:20 66:8 ss 75:4 staggered 72:21 stakem 2:3 stand 21:13 standard 27:16 29:15 standards 34:24 standing 46:20 start 28:17 started 14:3 state 13:19 42:20,23,25 75:3,7,24 stated 23:7 73:2 statement 17:15 19:2,4 43:4 52:3,5,6 65:14 statements 32:15 41:23 42:7 43:2 states 1:1 stating 52:21	status 1:10 74:18 stenotypy 75:9 step 15:21 23:23 27:15 steps 15:19 steven 2:4 6:3,5 54:11 stevep 2:8 stipulations 71:16 strah 6:5 21:14 21:17,23 36:15 54:5,11 55:8 62:5 64:5 street 2:23 3:8 3:12,16,22 4:8 4:12,17 5:12 5:17,22 6:19 7:3,13 8:3 stuff 53:9 submit 68:15 subpoena 26:1 substantiated 45:17 sudden 62:17 suddenly 74:2 sue 6:5 suggest 70:2 72:16,21 suggesting 61:6 71:16 suggestion 39:8 65:10	suite 2:5,11,15 3:4 4:4,9,18 5:5,18 6:7 7:4 7:14,19 suits 13:25 sullcrom.com 3:23,24,24,25 sullivan 3:21 summaries 11:18 43:20 sunday 74:2 support 53:15 53:20 supporting 20:18,19 supports 19:1,2 supposed 45:20 supreme 53:8 sure 9:3 22:8 23:19 41:6 45:23,23 61:14 64:16 67:7 69:23,23 70:8 71:25 surrounding 13:13 sutcliffe 4:12 swimmingly 47:6 sword 45:1,1 51:6 61:7,17 t t 6:2,3 taft 5:21
---	--	---	--

[take - time]

Page 23

take 21:21 23:22 32:6 47:23 48:9 52:15 65:13 71:17,19 taken 15:15,19 75:11 takes 74:4 talk 24:13 29:3 31:22 32:17 34:11 35:7,7 40:7 44:25 talked 33:1 34:19 42:12,17 42:25 talking 12:23 15:16 21:23 29:11 31:10,15 31:16,25 36:11 38:22,24 39:25 43:10 48:2 53:9 54:8 66:8 67:21,22 talks 31:13 42:20 targeted 32:22 tasha 3:20 taylor 6:5 tegler 2:12 tell 14:25 17:4 20:3 34:16 47:25 53:21 67:7 70:15 telling 20:9 24:19 30:17	57:10 tells 26:14,19 74:1 ten 70:2,8,8 71:5 72:10 73:17,17 tennessee 50:4 term 33:5 terminated 14:7 terminations 20:19 terms 11:5 49:20 71:7 74:9 terzian 4:3 test 12:23 15:3 25:22 31:3 testified 16:4 27:7,24 testifies 26:7 29:19 testify 37:11,12 37:17 53:19 testifying 18:10 testimonial 41:10,11,12,17 42:8 43:11,14 43:16 44:18 62:6 testimony 10:15 22:4 26:18 33:3 40:23 56:17 57:3	texas 43:19 thank 10:2 22:10 23:7,8 23:11,14,16 46:24 47:1,3 58:15,17,18,22 59:1 74:9 thing 27:13 28:11 32:16 37:16 43:12 51:1 53:12 64:7,11 65:15 68:3 things 14:23 25:9,15,18 28:16 29:1 33:9,11,15 36:12,14,21 38:25 40:4,18 42:12 45:2 48:16 61:8,10 61:20 67:4 think 13:8,11 20:25 23:22 24:18 28:2 29:15,22 30:16 31:3,12 36:10 36:18,24 38:2 39:7,22,23 42:17 45:10,12 45:13,17 46:21 47:4 59:11,14 61:5,21 62:16 63:4,17 64:1,8 64:12,18,21	67:2,9,17,18,20 68:16,17 69:21 70:9,11 71:4,6 71:11 72:6,8 73:1,12,16 74:11 thinking 60:4 64:6 70:8 third 15:22 thomas 2:9 4:2 6:3 thompson 3:20 thompontas 3:24 thornton 6:5 thought 70:7 71:13 thoughtful 64:23 thoughts 23:18 threat 13:6 14:19 threshold 42:1 thursday 1:14 73:18 time 9:8,14 13:17,17 17:8 17:9,17 22:6 28:19,25 30:13 30:14,16 33:12 36:4,17 40:22 41:2,7 52:12 52:12 55:9 58:1,1 60:21 60:22 62:15
---	--	--	--

[time - vorys.com]

Page 24

64:3,22 72:7 72:12 75:11 timetable 72:15 timothy 5:11 today 9:15 13:17 21:16 24:7 25:23 36:17 64:5 65:2,4 71:4 74:10 told 11:9 54:21 55:15,18,22 56:3 57:9 tom.warren 4:5 tony 48:12 53:14,16,17 took 16:11 22:6 44:19 50:11,13 51:5 totally 31:2 60:2 trafford 7:12 transcribed 22:9 75:9 transcript 54:10 56:12 64:5 73:7 transcription 75:9 transcripts 21:7,18 transparent 73:22 tricky 39:6	true 19:1 25:8 49:2,24 75:9 truly 35:2 trusted 53:7 try 15:1 67:3 67:14 71:21 trying 44:11 46:22 62:13,14 67:10 tucker 7:18 tuckerellis.com 7:21,21 tuesday 73:23 74:5 turn 9:3 23:3 62:9,20 turned 25:9 35:11 turner 6:5 two 14:1 19:20 19:23 24:5 27:4 32:24 37:5 39:3 46:6 49:24 50:16 59:14,14 61:23 70:22 71:3 72:20 73:2,4,4 73:9 twofold 10:8 type 32:16 types 25:9 32:4 36:21 49:18 typical 57:25 typically 31:15 49:17	u ultimate 42:14 43:21 52:24 uncovered 68:14 undated 34:9 underlying 39:17 43:23 46:18 54:18,21 55:3 understand 52:23 64:21 71:11 72:5,6 understanding 56:23 understood 64:1,1 underwriter 7:7 unfolding 27:11 uniformly 14:10 united 1:1 universe 31:11 32:18 unknown 66:2 unlawful 11:20 unnecessary 46:17 unprecedented 49:16 unusual 28:10 28:12 30:5 49:15	used 16:11 32:10 45:6 48:6,6 61:21 62:6 useful 23:22 uses 33:5 using 10:23 18:17 44:12 45:2 51:17 61:6,17 v vaccine 73:25 74:3 valiant 32:6 value 65:14 various 9:23 verb 38:15 veronica 6:18 veronica.call... 6:21 version 38:13 vespoli 6:14 vicarious 51:18 51:19,19 view 9:15 vine 4:8 violated 20:14 48:19,20 49:7 virtually 17:14 66:10 virtue 49:16 vorys 5:17,22 vorys.com 5:19 5:24
--	--	---	---

[w - yeah]

Page 25

w	wanted 15:7,12	west 2:5 3:16	work 11:15
w 2:13 7:12	wants 46:1	6:19 7:3	12:12 18:16
wait 9:5,7	wardwell 7:8	western 50:3	24:15 25:20
28:25	warren 4:2,3	whereof 75:15	29:9,11,11,24
waive 27:22	5:3	whoa 47:15,15	29:25 30:12
49:1 50:5	warrenterzia...	47:15	32:8 34:3,21
waived 19:22	4:5	wholesale 24:4	40:13,18 41:8
21:5 29:9,13	washington	37:4,5	42:9 45:12,18
49:22	4:13 6:16	win 44:9 45:3	49:13,22 50:6
waiver 12:13	water 48:14	61:11,17	62:16,23,24
18:4 30:2,10	way 11:5 13:23	winding 20:24	63:7,17 66:2,3
30:15 34:19,22	32:19,20 34:22	withheld 11:25	66:4,15,17
35:8 41:10,11	35:22 36:23	12:1,6	69:18
41:14,25 42:2	41:11 45:7,16	withholding	working 72:14
42:2,4,5,10,15	46:20 60:4	29:4	works 46:3
42:21,24 43:18	62:16 67:3	witness 11:17	48:17
43:25 44:14,24	68:3 69:10	11:18 16:12,13	world 27:6
44:25 45:12,20	ways 18:2	17:10 19:13	40:19 47:24
47:23 50:8,9	we've 17:14	20:16 37:11	64:11
54:1 62:11,18	23:25 34:19	39:20,21 40:21	worried 72:17
waivers 15:4	35:17 36:5,25	41:16 42:20	wrap 49:18
waiving 15:9	44:15,20 61:10	51:2 53:6,19	wright 7:13
62:24	68:17	54:23 57:18	writing 71:12
walling 20:23	wealth 19:15	66:7 75:15	72:8
want 9:2,3,4	wednesday	witness's 56:23	wrong 36:22,24
10:4 12:16	74:5	witnesses 10:16	37:8 48:24
20:2,7,10 22:2	week 16:3 21:7	17:18 18:1,6	wrote 52:5
22:8,15,24	45:22 57:15	18:11,18,19	x
23:19 36:3	72:23,23,25	19:12,19 20:3	x 19:4 52:5
39:6 44:5	73:18	20:10,18 37:17	67:7
53:11 59:9	weeks 11:7,9	39:13 47:13,25	y
64:12,22 69:14	wegryn 1:20	52:17,18 66:11	yeah 21:12
70:23 71:10,12	75:7,24	69:7,7,9 70:15	22:12 35:12
71:12 72:13	went 28:6	70:25 71:25	37:23 59:2,6
73:21		72:1	

[yeah - york]

Page 26

70:20,22 71:2
73:5
year 28:7,8
46:8
yearlong 28:14
years 18:23
32:24
yeboah 52:19
york 2:15 3:9,9
3:22,22 6:20
6:20 7:10,10